RECORD AND BRIEFS

No. 15-457

IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

SETH BAKER, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 9, 2015
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NOTICE

The following documents have been omitted from the printing of this Joint Appendix. They may be found in the Petitioner's Appendix to the 15-457 Petition For A Writ Of Certiorari at the following pages:

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Appendix B, District Court Stipulation and Order Granting Plaintiffs' Motion to Dismiss with Prejudice 35a

U.S. DISTRICT COURT FOR WESTERN WASHINGTON, SEATTLE

Case No. 2:11-cv-00722-RSM

SETH BAKER, ET AL.,

v.

MICROSOFT CORPORATION,

RELEVANT DOCKET ENTRIES

DATE	NO.	DOCKET TEXT
04/28/2011	1	COMPLAINT against defendant(s) Microsoft Corporation
06/27/2011	10	AMENDED COMPLAINT against defendant(s) Microsoft Corporation with JURY DEMAND
07/20/2011	14	MOTION to Strike Plaintiffs' Class Allegations or, in the Alternative, Deny Certification of Plaintiffs' Proposed Classes by Defendant Microsoft Corporation. Oral Argument Requested
07/20/2011	15	DECLARATION of Hiroo Umeno filed by Defendant Microsoft Corporation re [14] MOTION to Strike Plaintiffs' Class Allegations or, in the Alternative, Deny Certification of Plaintiffs' Proposed Classes

DATE	NO.	DOCKET TEXT
07/20/2011	16	**SEALED DOCUMENT** Exhibits 1-5 to Dkt 15 - Umeno Declaration in Support of Microsoft Corporation's Motion to Strike Class Allegations by Defendant Microsoft Corporation
07/20/2011	17	DECLARATION of Fred B. Burnside filed by Defendant Microsoft Corporation re [14] MOTION to Strike Plaintiffs' Class Allegations or, in the Alternative, Deny Certification of Plaintiffs' Proposed Classes
09/16/2011	23	RESPONSE, by Plaintiffs Seth Baker, Jesse Bernstein, Matthew Danzig, James Jarrett, Nathan Marlow, Mark Risk, to [14] MOTION to Strike Plaintiffs' Class Allegations or, in the Alternative, Deny Certification of Plaintiffs' Proposed Classes
09/16/2011	24	DECLARATION of Amy Williams-Derry filed by Plaintiffs Seth Baker, Jesse Bernstein, Matthew Danzig, James Jarrett, Nathan Marlow, Mark Risk in Support of Plaintiffs' Opposition to Defendants' [14] MOTION to Strike Plaintiffs' Class Allegations or, in the Alternative, Deny Certification of Plaintiffs' Proposed Classes

DATE	NO.	DOCKET TEXT
09/16/2011	25	DECLARATION of KEVIN COLUCCIO filed by Plaintiffs Seth Baker, Jesse Bernstein, Matthew Danzig, James Jarrett, Nathan Marlow, Mark Risk re [14] MOTION to Strike Plaintiffs' Class Allegations or, in the Alternative, Deny Certification of Plaintiffs' Proposed Classes
10/14/2011	26	REPLY, filed by Defendant Microsoft Corporation, TO RESPONSE to [14] MOTION to Strike Plaintiffs' Class Allegations or, in the Alternative, Deny Certification of Plaintiffs' Proposed Classes
10/14/2011	27	Supplemental DECLARATION of Stephen M. Rummage in Support of Microsoft Corporation's Motion to Strike Class Allegations filed by Defendant Microsoft Corporation re [14] MOTION to Strike Plaintiffs' Class Allegations or, in the Alternative, Deny Certification of Plaintiffs' Proposed Classes
03/27/2012	32	ORDER granting dft's [14] Motion to strike pltfs' class allegations by Judge Ricardo S Martinez
09/25/2012	35	MOTION to Dismiss with Prejudice by Plaintiffs Seth Baker, Jesse Bernstein, Matthew Danzig, James Jarrett, Nathan Marlow, Mark Risk

DATE	NO.	DOCKET TEXT
10/16/2012	37	STIPULATION AND ORDER granting pltf's [35] Motion to Dismiss by Judge Ricardo S Martinez
11/15/2012	38	NOTICE OF APPEAL (12-35946) to Ninth Circuit re [37] Order on Motion to Dismiss by Plaintiffs Seth Baker, Jesse Bernstein, Matthew Danzig, James Jarrett, Nathan Marlow, Mark Risk
03/14/2013	40	ORDER of USCA (12-35946) as to [38] Notice of Appeal, filed by Nathan Marlow, Mark Risk, Jesse Bernstein, Matthew Danzig, James Jarrett, Seth Baker. Appellees motion to dismiss this appeal for lack of jurisdiction is denied without prejudice to renewing the arguments in the answering brief
09/26/2013	41	ORDER of USCA (12-35946) as to [38] Notice of Appeal, filed by Nathan Marlow, Mark Risk, Jesse Bernstein, Matthew Danzig, James Jarrett, Seth Baker; Appellants unopposed motion for permission for appellant Jesse Bernstein to dismiss his appeal is granted
03/19/2015	42	OPINION of USCA (NOT THE MANDATE 12-35946) as to [38] Notice of Appeal, filed by Nathan Marlow, Mark Risk, Jesse Bernstein, Matthew Danzig, James Jarrett, Seth Baker

DATE	NO.	DOCKET TEXT
07/20/2015	43	ORDER AND AMENDED OPINION (NOT THE MANDATE 12-35946) as to [38] Notice of Appeal, filed by Nathan Marlow, Mark Risk, Jesse Bernstein, Matthew Danzig, James Jarrett, Seth Baker. REVERSED and REMANDED for further proceedings consistent with this opinion
07/30/2015	44	MANDATE of USCA (12-35946) as to [38] Notice of Appeal, filed by Nathan Marlow, Mark Risk, Jesse Bernstein, Matthew Danzig, James Jarrett, Seth Baker. The judgment of this Court, entered March 18, 2015 and amended July 20, 2015, takes effect this date. This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure. Costs are taxed against the appellee in the amount of $506.20. REVERSED and REMANDED
08/10/2015	45	ORDER VACATING PRIOR ORDER STRIKING CLASS ALLEGATIONS by Judge Ricardo S Martinez

U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 12-80085

SETH BAKER, ET AL.,

v.

MICROSOFT CORPORATION,

RELEVANT DOCKET ENTRIES

DATE	NO.	DOCKET TEXT
04/10/2012	1	PETITION FOR PERMISSION TO APPEAL PURSUANT TO RULE 23(f)
04/23/2012	2	Respondent Microsoft Corporation Answer to 23(f) Petition
06/12/2012	3	Filed order (EDWARD LEAVY and MICHAEL DALY HAWKINS) The court, in its discretion, denies the petition for permission to appeal the district court's March 27, 2012 order. *See* Fed. R. Civ. P. 23(f); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005) (per curiam)

U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 12-35946

SETH BAKER, ET AL.,

v.

MICROSOFT CORPORATION,

RELEVANT DOCKET ENTRIES

DATE	NO.	DOCKET TEXT
12/26/2012	4	Appellee Microsoft Corporation Motion to Dismiss the Case
01/22/2013	7	Appellants Seth Baker, Jesse Bernstein, Matthew Danzig, James Jarrett, Nathan Marlow and Mark Risk Response opposing Motion to Dismiss the Case
02/15/2013	8	Appellee Microsoft Corporation Reply to Response to Motion to Dismiss the Case
03/14/2013	9	Filed order (Appellate Commissioner): Appellee's motion to dismiss this appeal for lack of jurisdiction is denied without prejudice to renewing the arguments in the answering brief

DATE	NO.	DOCKET TEXT
04/22/2013	11	Opening Brief by Appellants Seth Baker, Jesse Bernstein, Matthew Danzig, James Jarrett, Nathan Marlow and Mark Risk
04/23/2013	14	Excerpts of Record by Appellants Seth Baker, Jesse Bernstein, Matthew Danzig, James Jarrett, Nathan Marlow and Mark Risk
04/24/2013	25	Appellants' paper copies of Excerpts of Record [14] in 4 volumes (Vols. 2, 3, 4 FILED UNDER SEAL)
05/22/2013	20	Answering Brief by Appellee Microsoft Corporation
06/24/2013	26	Reply Brief by Appellants Seth Baker, Jesse Bernstein, Matthew Danzig, James Jarrett, Nathan Marlow and Mark Risk
06/25/2013	28	Errata to Reply brief [26] filed by Appellants Seth Baker, Jesse Bernstein, Matthew Danzig, James Jarrett, Nathan Marlow and Mark Risk
09/26/2013	33	Filed clerk order: Appellants' unopposed motion for permission for appellant Jesse Bernstein to dismiss his appeal is granted
03/18/2015	44	FILED OPINION (MICHAEL DALY HAWKINS, JOHNNIE B. RAWLINSON and CARLOS T. BEA) REVERSED AND REMANDED.

DATE	NO.	DOCKET TEXT
		Judge: JBR Authoring, Judge: CTB Concurring. FILED AND ENTERED JUDGMENT
04/01/2015	46	Appellee Microsoft Corporation Petition for Rehearing En Banc
07/20/2015	53	Filed order and amended opinion (MICHAEL DALY HAWKINS, JOHNNIE B. RAWLINSON and CARLOS T. BEA). Microsoft Corporation's Petition for En Banc Rehearing, filed on April 1, 2015, is DENIED. No further petitions for rehearing or rehearing en banc will be accepted. REVERSED AND REMANDED
07/30/2015	54	MANDATE ISSUED. Costs taxed against Appellee in the amount of $506.20

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[Filed 10/05/2009]

C07-1121-JCC

In Re Microsoft Xbox 360 Scratched Disc Litigation

This order relates to all actions

ORDER

This matter is before the Court on Plaintiffs' motion for class certification and application of Washington law. (Dkt. No. 58). The Court has also considered Defendant's response (Dkt. No. 89), Plaintiffs' reply (Dkt. No. 105, and Defendant's surreply. (Dkt. No. 117). In addition to reviewing the parties' pleadings and attached declarations, exhibits and other submissions, the Court heard oral argument on September 29, 2009.

For the reasons below, the Court hereby DENIES Plaintiffs' motion to certify them as representatives of the proposed Console Owners Class. The Court FURTHER DENIES Plaintiffs' motion to certify them as representatives of the proposed Damaged Disc Subclass.

I. BACKGROUND

This case involves an alleged product defect of Defendant Microsoft Corporation's popular video-

game console, the Xbox 360. Microsoft launched the Xbox in November 2005, and has sold more than ten million of the machines since then. The success of the Xbox is partly the result of the high speeds at which it spins game discs. The Xbox is capable of spinning discs at 7500 rotations per minute, while competing products like the Nintendo Wii and Sony Playstation III spin discs at 3000 to 4000 rotations per minute. Plaintiffs claim that this allows the Xbox to load games more quickly, render smoother graphics, and create a better overall video-gaming experience. (Pl. Mot. 5-6 (Dkt. No. 58)).

Plaintiffs Jose Caraballo, Justin Hanson, Robert Ling III, Christine Moskowitz, Luis Torres and David Wood are Xbox owners from three different states who bought Xbox consoles in 2006 or 2007.[1] Each alleges that he or she was playing a video game when a grinding noise coming from inside the machine caught his or her attention. Each of them ejected the video-game disc and found deep grooves on its readable side.[2] In each case, the game disc had been rendered inoperable. Plaintiffs called Microsoft customer service and asked for a refund of the price of the damaged game discs. In all six cases, Microsoft refused. (Pl. Decls. (Dkt. No. 59-64)). Plaintiffs' experiences are not unique. Microsoft's customer-service department has received approximately 55,000 complaints about scratched game discs. (Pl. Mot. 9 (Dkt. No. 58)).

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[1] Caraballo is a resident of Pennsylvania; Hanson is a resident of Washington; and Ling, Moskowittz, Torres and Wood are residents of California. (Pl. Decls. (Dkt. No. 59-64)).

[2] In the case of Plaintiff Christine Moskowitz, her son Hunter was actually the principle user of the machine. He was using the machine when it damaged the disc. (Decl. (Dkt. No. 62)).

Plaintiffs allege that the damage occurred because the greater speed at which the Xbox rotates discs exerts greater gyroscopic pressure on the discs—pressure the machine is unable to handle. They allege that the machines had chucked the games discs from the spindle, and then kept trying to spin the chucked discs. Under Plaintiffs' theory, the discs, free from the spindles, wobbled and rubbed against an interior part of the Xbox, which caused the characteristic deep grooves. *(Id.* at 5-7).

Microsoft agrees that this scenario is possible, but argues that it can only occur if a game player misuses the machine by moving it while a disc is spinning inside. Microsoft first learned that the Xbox is capable of chucking game discs from their spindles a few months before the November 2005 product launch. Its engineers studied the problem and determined that the scenario occurred only when users tilted the machine *during* game play. (Def. Opp'n 8-9 (Dkt. No. 89)). Microsoft began the process of placing a warning sticker across the disc-tray mechanism which has a large green exclamation mark and reads: "Do not move console with disc in tray." Because the sticker lays across the disc tray, it is impossible for an owner to use the machine without having first removed the sticker. *(Id.* at 5).The Xbox manual also expressly warns people to "remove discs before moving the console or tilting it between the horizontal and vertical positions." (Pl. Mot. 10-11 (Dkt. No. 58)).

Plaintiffs argue that the Xbox suffers from a fundamental design defect which no warning can cure. The Xbox uses a tray-loading optical-disc drive: Users load game discs onto a slide-out tray, which is then pulled back into the machine. The machine then mounts the disc on a rotating spindle, where it is held

by magnetic force. Plaintiffs argue that the design of the tray-loading drive reflects older technology and that Microsoft should have used a slot-loading drive and a stronger disc holder. They point to the designs of the Microsoft Xbox's two chief competitors: the Sony Playstation III and the Nintendo Wii. Both use a slot-loading drive. And even though both machines spin discs at fewer rotations per minute, their disc holders apply greater force to discs. (Pl. Mot. 5-7 (Dkt. No. 58)) *and* (Sigman Decl. 19-20) (Dkt. No. 65-1)). Plaintiffs argue that Microsoft rejected three possible post-launch solutions to the alleged problem. Microsoft could have increased the magnetic force of the disc holder, slowed the rotation speed of the disc drive, or placed small soft patches inside the machine where the discs were likely to contact the machine parts. (Pl. Mot. 8-9 (Dkt. No. 58)).

Plaintiffs filed this suit in July 2007. In May 2009, they filed this motion, asking the Court to certify them as representatives of two classes: the *Console Owners Class*, which they define to include "all persons residing in the United States who, within four years preceding the filing of Plaintiffs' complaint on July 18, 2007, purchased or were given an Xbox 360 console"; and the *Damaged Disc Subclass*, which includes "all members of the Console Owners Class who purchased or were given Xbox 360 game discs that were subsequently scratched by an Xbox 360 and rendered unusable." (Pl. Mot. 2 (Dkt. No. 58)).

In addition to asking the Court to certify them as representatives of a class and subclass, Plaintiffs argue that this Court should apply the law of Washington State to all their claims, regardless of their different states of residence. If as many as fifty different state laws apply to Plaintiffs' potential class-

action claims, their case is more likely to be so unmanageable as to preclude class certification. *See, e.g., Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001). If, on the other hand, the law of Washington State applies to all claims, regardless of where a particular plaintiff resides, then common issues of law are much more likely to predominate, making class certification a more likely prospect. Because the resolution of the choice-of-law question affects the class-certification analysis, the Court addresses it first. *See Kelley v. Microsoft Corp.*, 251 F.R.D. 544 (W.D. Wash. 2008) (addressing the choice-of-law issue before turning to the question of class-action certification because "[v]ariations in state law affect the Court's analysis . . . under FED. R. CIV. P. 23.").

II. CHOICE OF LAW

The parties agree that Washington law governs this Court's choice-of-law analysis in a diversity case such as this.[3] (Pl. Mot. 28 (Dkt. No. 58)) *and* (Def. Opp'n 28 (Dkt. No. 89)). They disagree about how Washington law applies to a choice-of-law clause contained in the Xbox 360 warranty. The clause reads: "If you acquired the Xbox Product in the United States, the laws of the State of Washington, U.S.A., will apply to this Limited Warranty. *The laws of your state of residence will*

[3] The Court notes that the Due Process Clause of the U.S. Constitution also limits the application of state law in class actions. *See Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 550 (W.D. Wash. 2008). Microsoft declined to argue the constitutional issue. The Court addresses it in passing, and finds that the application of Washington State law is consistent with the U.S. Constitution for many of the same reasons offered by the *Kelley* court. *See Kelley*, 251 F.R.D. at 550 (noting, *inter alia*, that Microsoft is incorporated and has its principal headquarters in Washington).

apply to any tort claims and/or any claims under any consumer protection statutes." (Warranty (Dkt. No. 45 at 29)) (emphasis added). Plaintiffs argue that the Court should refuse to enforce this clause, because "contractual choice-of-law provisions do not dictate the choice of law for tort claims." (Pl. Mot. 34 (Dkt. No. 58)). Defendant, on the other hand, argues that the clause is enforceable as written. (Def. Opp'n. 25-28 (Dkt. No. 89)).

As a general rule, Washington courts abide by contractual choice-of-law and choice-of-forum provisions. *Truck Center Corp. v. General Motors Corp.*, 837 P.2d 631, 634 n.3 (Wash. App. 1992). There is an important exception, however: "A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *Dix v. ICT Group*, 160 P.3d 1016, 1021 (Wash. 2007) (quoting *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)); *see also Rutter v. BX of Tri-Cities, Inc.*, 806 P.2d 1266, 1268 (Wash. App. 1991) ("Washington courts will not give effect to an express choice-of-law clause if the application of the law of the chosen state would be contrary to a fundamental policy of Washington and Washington has a materially greater interest in the determination of the particular issue."). Washington courts have constructed a three-step approach to determining whether to enforce a choice-of-law provision. In *McKee v. AT&T Corp.*, the State Supreme Court stated that courts "disregard the contract provision and apply Washington law if, (1) without the provision, Washington law would apply; (2) the chosen state's law violates a fundamental public policy of Washington; and (3) Washington's interest in the determination outweighs the chosen state's interests."

McKee, 161 P.3d 845, 851 (Wash. 2008) (numbering added). The test is conjunctive: Washington courts invalidate a choice-of-forum clause only if a moving party meets all three requirements. Because this Court finds the issue of public policy dispositive, it does not reach the other issues.

A. Public Policy

Two cases recently decided by the Washington State Supreme Court are particularly instructive: *Dix v. ICT Group*, 161 P.3d 1016 (Wash. 2007), and *McKee v. AT&T Corp.*, 191 P.3d 845 (Wash. 2008). In *Dix*, plaintiffs alleged that ICT Group, a customer-service company working for America Online, Inc. (AOL), had violated the Washington Consumer Protection Act by conspiring with AOL to charge users for unwanted second and third user accounts created under dubious circumstances. Each plaintiff alleged damages of less than one-hundred dollars. *Dix*, 161 P.3d at 1018-19. The trial court dismissed the action because of a forum-selection clause in AOL's standard-form contract which provided:

> You expressly agree that exclusive jurisdiction for any claim or dispute with AOL or relating in any way to your membership or your use of the AOL Services resides in the courts of Virginia and you further agree and expressly consent to the exercise of personal jurisdiction in the courts of Virginia in connection with any dispute including any claim involving AOL or AOL Services.

Id. at 1018. The Washington State Supreme Court reversed, finding that the clause left the plaintiffs and others in their position without an effective remedy because Virginia law foreclosed the class-action

device. *Id.* at 1022. The provision therefore violated a public-policy choice manifested in the CPA: "[Washington State] public policy is violated when a citizen's ability to assert a private right of action [under the CPA] is significantly impaired by a forum selection clause that precludes class actions in circumstances where it is otherwise economically unfeasible for individual consumers to bring their small-value claims." *Id.* at 1024.

In *McKee,* the plaintiff objected that AT&T was improperly charging him municipal telephone taxes for a city in which he did not reside. He filed a lawsuit alleging less than twenty dollars in damages, but noted that "small amounts add up to very large sums." 191 P.3d at 848. AT&T moved to dismiss, relying on a choice-of-law provision in the customer contract which required the application of New York law, as well as another provision which required that all disputes be resolved via arbitration rules that specifically forbade class actions. *Id.* at 849. The trial court refused to enforce the clauses, and the State Supreme Court affirmed, stating that "a forum-selection clause that seriously impairs the plaintiff's ability to go forward on a claim of small value by eliminating class suits in those circumstances where there is no feasible alternative for seeking relief violates public policy and is unenforceable." *Id.* at 852 (citing *Dix,* 161 P.3d at 1022).

At first glance, the cases seem to support Plaintiffs' position. The State Supreme Court held that Washington public policy favors class-action resolution of small claims, and trumps contractual choice-of-forum and choice-of-law provisions. Plaintiffs argue that this ends the inquiry: "Preventing the aggregation of claims such as those asserted here ... is a procedural

device with a substantive effect: as a practical matter, it would shield Microsoft from liability for violating tort and consumer-protection laws." (Reply 16 (Dkt. No. 105)).

This Court finds that a closer reading of the cases, combined with more careful attention to the facts of this case, supports Defendant's position. In *Dix*, AOL's provision would have required Washington residents to litigate in courtrooms on the other side of the country. Microsoft's provision requires no such thing, and in fact subjects Microsoft to liability in the *plaintiff's* most convenient forum, his or her home state. In *McKee*, AT&T's choice-of-law provision would have required that Washington residents hire an attorney familiar with New York law. Microsoft's provision imposes no such burden, and in fact obligates *Microsoft* to familiarize itself with the consumer-protection laws of fifty different states. In short, in both *Dix* and *McKee*, corporate defendants attempted to bind customers to legal rules that specifically foreclosed the possibility of class-action status, and the Washington State Supreme Court found that their attempts offended public policy. Microsoft's choice-of-forum provision, on the other hand, is enforceable, because it leaves open a "feasible alternative for seeking relief." *See McKee*, 191 P.3d at 852. Aggrieved Xbox customers have the option of filing *statewide* class-action suits in their home states. Plaintiffs fail to point to a Washington case holding that the State's public policy is to guarantee *nationwide* class-action resolution of small claims, and this Court does not read *Dix* and *McKee* as stating that much.

Plaintiffs' motion to apply Washington law is DENIED.

III. CLASS-ACTION CERTIFICATION

The analytical framework for class-action certification is clear: The party seeking certification must establish (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998) (describing the requirements of FED. R. CIV. P. 23(a)). Some of the requirements involve similar considerations. *See, e.g., Armstrong v. Davis*, 275 F.3d 849, 868 (2001) (noting that "the commonality and typicality requirements tend to merge into one another"). If potential class representatives meet the four requirements of Rule 23(a), they must then demonstrate that the stated claim for relief falls within one of the three categories outlined in Rule 23(b). In this case, the named plaintiffs argue that their claims meet the requirements of Rule 23(b)(3), which permits class certification where "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3). Throughout the class-action-certification inquiry, the plaintiff bears the burden of proof. *Zinser v. Accufix Research Inst.*, 253 F.3d 1180, 1186 (9th Cir. 2001).

Because the Court finds that Plaintiffs fail to meet the predominance requirement of Rule 23(b)(3), it does not consider the four requirements of Rule 23(a).

A. Predominance

Rule 23(b)(3) permits a class action to be maintained if "the court finds that the questions of law or fact common to class members predominate over any

questions affecting only individual members, and that a class action is superior to other available methods for fairly adjudicating the controversy." FED. R. CIV. P. 23(b)(3). The requirements of Rule 23(b)(3) test "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997). As the Ninth Circuit has stated, "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than an individual basis." *Hanlon*, 150 F.3d at 1022 (internal markings omitted).

Because the choice-of-forum clause in Microsoft's limited warranty is enforceable, individual issues of law predominate over common issues of law. State consumer-protection law varies considerably across the fifty states. As a leading treatise states, "There is no monolithic products-liability law in the United States.... [T]his Balkanization creates enormous confusion when comparing the detailed aspects of the law of one state with that of another." FRUMER & FRIEDMAN, 1 PRODUCTS LIABILITY § 2.01 (1997). This defect alone would justify the Court in denying Plaintiffs' motion for class certification, as the application of fifty different state laws in a single adjudication would create innumerable difficulties. *See Zinser*, 253 F.3d at 1189 ("Where the applicable law derives from the law of the fifty states, as opposed to a unitary federal cause of action, differences in state law will compound the disparities among class members from the different states.").

Individual issues of fact also predominate over common issues of fact. In this context, the Court finds

the reasoning of Judge Andrew Guildford of the Central District of California especially persuasive. In *Gable v. Land Rover N.A., Inc.*, the plaintiffs sought to represent a class of "all current and former owners and lessees of model year 2004, 2005, and 2006 Land Rover LR3s purchased or leased in the state of Michigan." No. CV07-0376, 2008 WL 4441960 (C.D. Cal. 2008). The plaintiffs alleged that *all* of the vehicles suffered a manufacturing defect which caused *some* of the vehicles to wear the tires out unevenly. Plaintiffs alleged that some owners had to purchase new tires too early because of the alleged defect, and argued that Land Rover should bear the cost. The court denied the motion for class certification, in part because individual issues with respect to the factual question of *damages* predominated over common questions. The court noted that many members of the proposed class had not actually experienced the defect. *See id.* at *3 ("Cars and tires have a limited useful life. At the end of their lives they, and whatever defect they may have contained, wind up on a scrap heap. If the defect has not manifested in that time, the buyer has received what he bargained for." (*citing Hicks v. Kaufman & Broad Home Corp.*, 89 Cal. App. 4th 908, 923 (2001))). In addition to finding that individual issues of *damages* predominated over common issues, the court found that individual issues of *causation* predominated over common issues, stating:

> Without individual inquiry, there is no way in adjudicating this case to determine whether the need for a particular repair was based on normal wear, a defective original part, a defective after-market part, environmental factors such as weather or road conditions, the presence of foreign objects in the braking system, the failure of parts other than the

> braking system, poor workmanship by a third party, or individual driving habits.

Id. at *4 (*citing Kia Motors America Corp. v. Yvonne Butler,* No. 3D05-1 1455 (Fla. Dist. Ct. App. 2008)).

This Court is persuaded by the reasoning of Judge Guilford. Plaintiffs have alleged a defect that actually manifests in fewer than one percent of the Xbox consoles sold. In today's era of increasingly sophisticated image rendering, processor speed, and memory storage, many of the millions of satisfied Xbox owners will have replaced their consoles in a few years with a new system that makes the Xbox obsolete by incorporating new technology. The Xbox consoles of those happy customers will have ended up in the video-game console equivalent of the "scrap heap," gathering dust in the basement next to Atari 2600 consoles, Nintendo Entertainment Systems, and Sega Genesis machines.[4] In short, "[i]f the defect has not manifested [during the limited useful life of the Xbox 360], the buyer has received what he bargained for." Individual issues of *damages* therefore preclude the certification of the Console Owners Class.

Individual issues of *causation* also predominate, just as in *Gable.* In *Gable,* some of the plaintiffs' vehicle frames may have distorted because of poor attempts at parallel parking or under-inflated tires. *Gable,* 2008 WL 4441960 at *3. Similar issues of causation arise in this case. Some plaintiffs might have suffered scratched discs because a pet dog, waking from its sleep to see its master playing *Dance Dance Revolution,*

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[4] The Atari 2600, launched in 1977, was one of the earliest video-game systems. The original Nintendo Entertainment System was launched in 1983, and the Sega Genesis was launched in 1988. All three are now relics.

rushed over to join in the fun, knocking the machine off a shelf in the process. Other discs might have scratched when an overzealous *Guitar Hero* strummed the electronic chords too energetically, unwittingly striking the machine while living his fantasy of rock-stardom.[5] Whether each user's actions constituted misuse, and whether his or her use/misuse caused the damage, would present individual issues of fact for the jury.

Plaintiffs attempt to distinguish *Gable*, but fail. They argue:

> The district court denied class certification on the ground that only a fraction of the proposed class members had actually experienced the defect and because misalignment could have many different causes. Here, in contrast, the design defect appears in every Xbox console sold and the injury linked to the defect—the distinctive deep circular gouges in game discs—can plausibly come from only one cause: the defective Xbox 360 [optical-disc drive] design.

(Pl. Mot. 22 (Dkt. No. 58)). Plaintiffs' argument misses the mark. The *Gable* court acknowledged that every Land Rover suffered the same design flaw, but nonetheless refused to certify the class, because the defect had not *manifested* in every Land Rover. That is exactly the case here. The Xbox 360 may suffer from a design defect, but that defect has not manifested in the vast majority of the machines that have been sold, which means individual issues predominate with

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[5] *Dance Dance Revolution* and *Guitar Hero* are popular games that require users to dance particular steps and play musical instruments, respectively.

respect to damages. With respect to causation, the *Gable* court left open the possibility that a defective design may have contributed to the premature tire wear. The court simply found that other proximate causes may have conspired to produce that result in different ways in different cases, meaning individual issues of fact predominated. The same is true here: Just as poor parallel-parking skills and under-inflated tires may have caused a pre-existing defect to manifest in different ways, the hypothetical pet dog and guitar hero might have set in motion a chain of causes ending in disc scratching. Even if one link of that chain is a design defect, the other links are unique to each plaintiff and require individual attention. The requirements of individual attention to each plaintiff on issues of law and fact make this case an inappropriate candidate for class-action resolution.

IV. Conclusion

For the foregoing reasons, the Court hereby DENIES Plaintiffs' motion to certify them as representative of the *Console Owners Class* and *Damaged Disc Subclass*. The Court also DENIES Plaintiffs' motion to apply Washington law to their claims.

Dated this 5th day of October, 2009

/s/ John C. Coughenour
JOHN C. COUGHENOUR
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Jan. 21, 2010]

No. 09-80160
D.C. No. 2:07-cv-01121-JCC
Western District of Washington, Seattle

LUIS TORRES, individually and on behalf of all others similarly situated; et al.,

Plaintiffs-Petitioners,

v.

MICROSOFT CORPORATION, a Washington Corporation,

Defendant-Respondent.

ORDER

Before: SILVERMAN and PAEZ, Circuit Judges.

The court, in its discretion, denies the petition for permission to appeal the district court's October 5, 2009 order denying class action certification. *See* Fed. R. Civ. P. 23(f); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005) (per curiam).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. 2:11-cv-00722-RSM

SETH BAKER, JESSE BERNSTEIN, MATTHEW DANZIG, JAMES JARRETT, NATHAN MARLOW, and MARK RISK, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MICROSOFT CORPORATION, a Washington Corporation,

Defendants.

AMENDED COMPLAINT — CLASS ACTION FOR:

1. **BREACH OF EXPRESS WARRANTY;**
2. **BREACH OF IMPLIED WARRANTY;**
3. **VIOLATION OF THE MAGNUSON-MOSS WARRANTY – FEDERAL TRADE COMMISSION IMPROVEMENT ACT, 15 U.S.C. § 2301(3);**
4. **VIOLATION OF CONSUMER PROTECTION LAWS;**
5. **NEGLIGENCE; AND**
6. **STRICT LIABILITY**

JURY TRIAL DEMANDED

SUMMARY OF CLAIMS

1. This is a class action against Microsoft Corporation for Breach of Express Warranty, Breach of Implied Warranty, Violation of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. § 2301(3), violation of the consumer protection laws of the States of California, Illinois, Michigan, New York and Washington, Strict Liability, and, alternatively, Negligence. Plaintiffs bring this action on behalf of themselves and all other persons who own Microsoft Xbox 360 gaming consoles or had Xbox game discs damaged by their Microsoft Xbox 360 gaming consoles. The Xbox 360 plays game discs in an Optical Disc Drive ("ODD") similar to those found in home DVD players and in desktop and notebook personal computers. The Xbox 360 gaming console (variously, the "Xbox 360") is defectively designed because when an Xbox 360 is tilted or swiveled—even slightly—while a game disc is in the ODD, ODD components can contact the game disc, creating a distinctive circular "gouge" on the underside of the disc, rendering it permanently unplayable.

2. A prior proposed class action against Microsoft based on this defect in the Xbox 360 was denied certification based on the decision in *Gable v. Land Rover N. Am., Inc.*, No. CV07-0376, 2008 WL 4441960 (C.D. Cal. Sept. 29, 2008). The decision in *Gable* was reversed on appeal. *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168 (9th Cir. 2010). Relying in part on the Ninth Circuit's decision, Plaintiffs now bring the present proposed class action.

THE PARTIES

3. Plaintiff Seth Baker is an individual resident of Illinois. Plaintiff Baker is the original purchaser and current owner of an Xbox 360 gaming console. Plaintiff Baker brings this action individually and as a class action under rule 23 of the Federal Rules of Civil Procedure on behalf of the Class and Subclasses specified below.

4. Plaintiff Jesse Bernstein is an individual resident of New York. Plaintiff Bernstein is the original purchaser and current owner of an Xbox 360 gaming console. Plaintiff Bernstein brings this action individually and as a class action under rule 23 of the Federal Rules of Civil Procedure on behalf of the Class and Subclasses specified below.

5. Plaintiff Matthew Danzig is an individual resident of California. Plaintiff Danzig is the original purchaser and current owner of an Xbox 360 gaming console. Plaintiff Danzig brings this action individually and as a class action under rule 23 of the Federal Rules of Civil Procedure on behalf of the Class and Subclasses specified below.

6. Plaintiff James Jarrett is an individual resident of California. Plaintiff Jarrett is the original purchaser of two Xbox 360 gaming consoles and the current owner of one. Plaintiff Jarrett brings this action individually and as a class action under rule 23 of the Federal Rules of Civil Procedure on behalf of the Class and Subclasses specified below.

7. Plaintiff Nathan Marlow is an individual resident of Washington. Plaintiff Marlow is the original purchaser and current owner of an Xbox 360 gaming console. Plaintiff Marlow brings this action individually and as a class action under rule 23 of the

Federal Rules of Civil Procedure on behalf of the Class and Subclasses specified below.

8. Plaintiff Mark Risk is an individual resident of Michigan. Plaintiff Risk is the original purchaser and current owner of an Xbox 360 gaming console. Plaintiff Risk brings this action individually and as a class action under rule 23 of the Federal Rules of Civil Procedure on behalf of the Class and Subclasses specified below.

9. Defendant Microsoft is a corporation organized under the laws of the State of Washington, with its principal place of business at One Microsoft Way, Redmond, WA 98052-6399. Microsoft is the manufacturer of the Xbox 360 gaming console and also provides support for the Xbox 360 through the http://www.xbox.com website. Purchasers of the Xbox 360 presumptively include citizens of every state in the United States.

JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(d)(2) in that it is a class action filed under rule 23 of the Federal Rules of Civil Procedure, the matter in controversy, as aggregated pursuant to 28 U.S.C. § 1332(d)(6), exceeds the sum of $5,000,000 exclusive of interest and costs, and a substantial number of members of the class of plaintiffs are citizens of a state different from Microsoft.

11. Venue is proper in the Western District of Washington pursuant to 28 U.S.C. § 1391(a) and (c), in that Microsoft is a Washington corporation with its principal place of business in the Western District of Washington, and Microsoft is subject to personal jurisdiction in the State of Washington.

CLASS ACTION ALLEGATIONS

12. Plaintiffs bring this action as a class action pursuant to Federal Rule of Civil Procedure 23(a), (b)(2), and (b)(3) on behalf of the following Class and Subclasses:[1]

a. Nationwide Console Class on behalf of all persons in the United States who own Microsoft Xbox 360 gaming consoles;

b. Nationwide Damaged Disc Subclass on behalf of all persons in the United States who had game discs damaged by their Microsoft Xbox 360 gaming consoles;

c. State Subclasses as further described below:

i. The California State Subclass on behalf of all persons in California who had game discs damaged by their Microsoft Xbox 360 gaming consoles;

ii. The Illinois State Subclass on behalf of all persons in Illinois who had game discs damaged by their Microsoft Xbox 360 gaming consoles;

iii. The Michigan State Subclass on behalf of all persons in Michigan who had game discs damaged by their Microsoft Xbox 360 gaming consoles;

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[1] For purposes of these class definitions, "persons . . . who had game discs damaged by their Microsoft Xbox 360 gaming consoles" refers only to those persons whose discs have suffered the distinctive circular scratch caused by the game disc coming in contact with internal components in the ODD of the Xbox 360—damage that causes the game discs' normal functions and operations to be impaired.

iv. The New York State Subclass on behalf of all persons in New York who had game discs damaged by their Microsoft Xbox 360 gaming consoles;

13. Plaintiffs reserve the right to amend class and subclass definitions as litigation proceeds.

14. Excluded from the Proposed Class and Subclasses are officers and directors of Microsoft, members of their immediate families, and each of their legal representatives, heirs, successors or assigns, and any entity in which Microsoft has or has had a controlling interest.

15. This action is properly maintainable as a class action because:

a. The members of the Class and Subclasses for whose benefit this action is brought are dispersed throughout the United States and are so numerous that joinder of all Class and Subclass members is impracticable. While the exact number of Class and Subclass members is unknown to Plaintiffs at this time and can only be ascertained through appropriate discovery, Plaintiffs believe that Class members number in the millions, and that members of each Subclass number in at least the tens of thousands. Members of the Class and Subclasses may be identified from records maintained by Microsoft and may be notified of the pendency of this action by mail, using a form of notice similar to that customarily used in class actions;

b. Plaintiffs share a community of interest with all members of the Class and Subclasses in that:

i. Plaintiffs' claims are typical of those of the Class and Subclasses as all members of the Class and Subclasses are similarly affected by Microsoft's actionable conduct as alleged herein; and

ii. Plaintiffs will fairly and adequately protect the interests of the Class and Subclasses and Plaintiffs have retained counsel competent and experienced in class action litigation in the U.S. District Courts. Plaintiffs have no interests antagonistic to, or in conflict with, the Class and Subclasses that Plaintiffs seek to represent;

c. A class action is superior to other available methods for the fair and efficient adjudication of the claims asserted herein. Because the damages suffered by individual members of the Class and Subclasses may be relatively small, the expense and burden of individual litigation make it virtually impossible for Class and Subclass members to redress the wrongs done to them. The likelihood of individual Class and Subclass members prosecuting separate claims is remote;

d. Microsoft has acted or refused to act on grounds generally applicable to the Class and Subclasses, thereby making appropriate final injunctive relief with respect to the Class and Subclasses as a whole;

e. Plaintiffs anticipate no difficulties in the management of this action as a class action; and

f. The questions of law and fact common to the members of the Class and Subclasses predominate over any questions affecting individual

members of the Class and Subclasses. Among the questions of law and fact common to the Class and Subclasses are:

i. The pervasiveness, propensity and/or likelihood of Xbox 360s damaging game discs and the circumstances in which Xbox 360s damage game discs;

ii. The existence of any express warranties made by Microsoft concerning the Xbox 360;

iii. The application of any such express warranties to the claims asserted in this action;

iv. Whether Microsoft has breached any of its express warranties, as alleged herein;

v. The existence of any implied warranties made by Microsoft concerning the Xbox 360;

vi. The application of any such implied warranties to the claims asserted in this action;

vii. Whether Microsoft has breached any of its implied warranties, as alleged herein;

viii. The application of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. § 2301(3), to the claims asserted in this action;

ix. Whether Microsoft has breached the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, as alleged herein;

x. The application of the consumer protection laws of California, Illinois, Michigan, New York and Washington to the claims of the pertinent Subclasses alleged in this action;

xi. Whether Microsoft has taken adequate measures to prevent damage to game discs placed in Xbox 360s;

xii. Whether Microsoft has taken adequate measures to compensate Class and Subclass members who have had game discs damaged by their Xbox 360s;

xiii. Whether Microsoft breached any of the consumer protection laws of California, Illinois, Michigan, New York and Washington;

xiv. Whether Microsoft's marketing and sales of Xbox 360s which it knows can damage game discs during anticipated normal use is an "unfair or deceptive act or practice" under the consumer protection laws of California, Illinois, Michigan, New York and Washington, as asserted herein;

xv. Whether Microsoft is strictly liable to the Nationwide Class and Subclass, as alleged herein;

xvi. If no express or implied covenants exist between Microsoft and the Class and Subclasses, whether Microsoft was negligent in selling Xbox 360s which can damage game discs, CDs and DVDs; and

xvii. To what extent the members of the Class and Subclasses have sustained injury and the proper measure of compensation.

SUBSTANTIVE ALLEGATIONS COMMON TO ALL COUNTS

The Xbox 360

16. The Xbox 360 is Microsoft's latest video game console and was the first of the most advanced generation of game consoles. The Xbox 360 competes with Sony's PlayStation 3 and Nintendo's Wii. There are now six different configurations of the Xbox 360 that have been sold to the public—the Xbox 360 S, the Xbox 360 Premium 60GB, the Xbox 360 Arcade, the Xbox 360 Elite, the Xbox 360 Pro/Premium 20GB and the Xbox 360 Core System. The suggested retail price for the Xbox 360 has ranged from $479.99 for the Elite to $149 for the Arcade. On information and belief, more than 50 million Xbox 360s have been sold worldwide.

17. All Xbox 360s include a built-in ODD which is used to play game discs licensed by Microsoft for the Xbox 360 and select backward-compatible games made for the original Xbox system.

18. Games for the Xbox 360 retail at various prices between $29.99 and $59.99 with almost all new titles being initially priced at $59.99. Although all games for the Xbox 360 are licensed by Microsoft, the games are published by many different companies in addition to Microsoft itself. On information and belief, Microsoft itself is not the largest single publisher of Xbox games.

19. In addition to games, the Xbox 360's ODD can also play a range of optical media such as audio CDs and DVDs.

20. Xbox 360s are intended for use in the home and are depicted in Microsoft sales literature as sitting on

the floor near a television or resting on an ordinary shelf within a bookcase or home entertainment center.

21. Microsoft's television commercials often depict users engaging in spirited movements as they enthusiastically play games which simulate, among other activities, athletic competition (e.g., "2010 FIFA World Cup South Africa"), infantry warfare (e.g., "Call of Duty") or live rock music performance (e.g., "Guitar Hero").

22. Microsoft has recently launched the "Kinect," a peripheral device for the Xbox 360 which tracks body movements and allows users to control games though their own movements in space. Microsoft's campaign for the Kinect advises users to "Simply jump in."

23. Since the introduction of the Xbox 360, Microsoft has received multiple complaints that the Xbox 360 scratches game discs. These scratches can prevent the discs from functioning properly and, in many cases, the Xbox 360 scratches the discs so severely as to render them unusable. The scratch in question is a distinctive circular scratch which prevents data on the disc from being read by the ODD.

24. The scratches in question are caused by small movements of the Xbox 360 which cause rotating game discs to become decoupled from the ODD spindle and then crash into internal ODD components.

25. Because CD and DVD media supported by ODDs are robust, ODDs are found in numerous consumer products where they are routinely subjected to high levels of tilt, swivel, and vibration. For example, ODDs are found in automobile CD and DVD players, notebook computers, portable DVD players, and digital video camera/recorders ("camcorders"). Sony introduced a portable CD player called the

"Discman" in 1984, which was designed to play CDs while users walked, ran, or bicycled. Portable CD players of this type are still sold and commonly used today.

26. Although these consumer-operated CDs and DVDs are routinely subjected to tilting and movement while operating, none of the media played in these consumer products have experienced widespread disc scratching problems. Industry engineers have long anticipated this problem and have learned to provide simple, inexpensive and obvious measures to protect optical discs in consumer applications while the ODD is in use and the disc is spinning. As a result, there is a reasonable consumer expectation that consumer products with ODDs will not cause media discs to be scratched even when the products are tilted, vibrated, or slightly rotated in the course of expected everyday use.

27. The ODD in the Xbox 360, however, is unable to withstand even the smallest of movements, including the minute unintentional movements to which it is reasonably expected all consumer devices will be subjected when placed in an ordinary household environment due to vibrations or other sources of indirect force being applied to the Xbox 360.

28. The printed user instruction materials packaged with the Xbox 360 do not indicate anywhere that the Xbox 360 can scratch discs due to even the smallest of movements, including the minute unintentional movements to which it is reasonably expected all consumer devices will be subjected when placed in an ordinary household environment due to vibrations or other sources of indirect force being applied to the Xbox 360.

29. The printed user instruction materials packaged with the Xbox 360 do not caution users to place their consoles on any special type of platform designed to isolate the console from vibrations or other sources of indirect force during normal use.

30. Despite the complaints it has received from consumers about the circular scratches to game discs, Microsoft has publicly denied the problem and has claimed that the game discs were being damaged due to deliberate movement of the Xbox 360 while the discs were being played.

31. Microsoft has refused to recall the Xbox 360 to repair the problem with the ODD and, with limited exceptions, has refused to provide compensation to Class and Subclass members whose game discs were damaged by the Xbox 360 ODD.

32. The design of the Xbox 360 ODD was developed in the State of Washington, and it was from or in the State of Washington that Microsoft has made decisions, received complaints, and issued communications about the Xbox 360 and the Xbox 360's ODD design.

The Disc Replacement Program

33. On or about April 2007, Microsoft began a limited disc replacement program (the "disc replacement program") wherein it offered to replace damaged game discs. The disc replacement program is, however, limited to "games where Microsoft is the publisher." According to Microsoft's xbox.com website, as of April 7, 2011, only the following games were available for disc replacement.

* Alan Wake

* Banjo Kazooie: Nuts & Bolts

* Crackdown 2
* Dance Central
* Fable II
* Fable III
* Forza Motorsport 2
* Forza Motorsport 3
* Gears of War
* Gears of War 2
* Halo 2
* Halo 3
* Halo 3: ODST
* Halo: Reach
* Halo Wars
* Kinectimals
* Kinect Adventures!
* Kinect Joy Ride
* Kinect Sports
* Lost Odyssey
* Ninja Gaiden 2
* Project Gotham Racing 4
* Scene It? Box Office Smash
* Viva Piñata
* Viva Piñata: Trouble In Paradise
* Xbox 360 triple pack

34. The disc replacement program does not provide for replacement without charge for damaged discs;

rather, Microsoft charges $20.00 to U.S. customers for disc replacement and the replacement consists of "the game disc only, without case or game documents."

35. Since the cost to press and ship a replacement game disc is significantly less than a dollar, Microsoft is deriving a profit of $19.00 or more on each disc it replaces under its disc replacement program.

36. The disc replacement program provides no relief to those users of Xbox 360s whose games discs were damaged by the Xbox 360 but are not available for disc replacement.

37. The disc replacement program was conceived, begun and implemented from Microsoft headquarters in the State of Washington.

The Plaintiffs

Plaintiff Baker

38. In or about November 2007, plaintiff Baker purchased an Xbox 360 from Amazon.com and the console was then delivered to his residence.

39. In or about November 2009, plaintiff Baker purchased an Xbox 360 game titled "Call of Duty: Modern Warfare 2." The game was then scratched by the Xbox 360, through no fault of Baker's own, at Baker's residence in Illinois. The scratches on plaintiff Baker's game disc caused his Xbox 360 to freeze and prevent individual profiles from being saved when using the game disc. The scratches also rendered his game disc useless and permanently unplayable.

Plaintiff Bernstein

40. Within the past two years, Plaintiff Bernstein purchased an Xbox 360 within the state of New York.

41. Subsequent to that purchase, plaintiff Bernstein purchased an Xbox 360 game titled "Tom Clancy's Rainbow Six: Vegas." The game was then scratched by the Xbox 360 in Bernstein's residence in New York through no fault of Bernstein's own. The scratches on plaintiff Bernstein's game disc caused his Xbox 360 to freeze and prevent individual profiles from being saved when using the game disc. The scratches also rendered his game disc useless and permanently unplayable.

Plaintiff Danzig

42. In or about November 2006, plaintiff Danzig purchased an Xbox 360 from a Micro Center store within the state of California.

43. Between November 2006 and May 2008, plaintiff Danzig purchased various Xbox 360 games, including "Grand Theft Auto IV," "Madden NFL 07," "Madden NFL 08," and "Gears of War."

44. Each of these four games was then scratched by the Xbox 360 in Danzig's residence in California through no fault of Danzig's own. The scratches on plaintiff Danzig's game discs caused his Xbox 360 to freeze and prevent individual profiles from being saved when using the game discs. The scratches also rendered his game discs useless and permanently unplayable.

Plaintiff Jarrett

45. In or about December 2007, plaintiff Jarrett purchased an Xbox 360 from a retailer in Concord, California. He and his son were the primary users of this machine.

46. Beginning in the early months of 2008, Jarrett purchased game discs in Cocord, California to play on his machine.

47. Likewise beginning in the early months of 2008, at least three of the game discs that Jarrett purchased to play on his Xbox 360 were scratched by this machine in Jarrett's residence in California through no fault of Jarrett's (or his son's) own. The scratches on these discs caused Jarrett's Xbox 360 to freeze and prevent individual profiles form being saved when using the game disc. The scratches also rendered the game discs useless and permanently unplayable.

48. In January 2008, Jarrett called Microsoft Tech Support to inform the company of his scratched game disc for "Rock Band I"—one of the games he had purchased—and to seek a replacement disc. Microsoft told him that there was nothing wrong with his machine and that he should simply return the disc to the store where it was purchased. Microsoft never replaced the game disc or reimbursed him for its cost.

49. After the Xbox 360 Jarrett had purchased in or about December 2007 had scratched three disks, he decided to purchase another Xbox 360. Jarrett thought that the scratches that he was suffering were a problem unique to that one machine. He did not believe the problem would manifest itself again in a new machine.

50. Thus, at the end of 2009, he purchased another Xbox 360 from Toys "R" Us in Concord, California.

51. This second machine, however, had the same defects as the first. From the time of purchase through the autumn of 2010, at least five of the game discs that Jarrett purchased to play on his Xbox 360 were scratched by this machine in Jarrett's residence in

California through no fault of Jarrett's (or his son's) own. The scratches on these discs caused Jarrett's Xbox 360 to freeze and prevent individual profiles form being saved when using the game disc. The scratches also rendered the game discs useless and permanently unplayable.

Plaintiff Marlow

52. On or about September 15, 2007, plaintiff Marlow purchased an Xbox 360 from a Game Stop store within the state of Washington.

53. On or about December 2008, plaintiff Marlow purchased an Xbox 360 game titled "Gears of War 2." The game was then scratched by the Xbox 360 in Marlow's residence in Washington through no fault of Marlow's own. The scratches on his game disc caused his Xbox 360 to freeze and prevent individual profiles from being saved when using the game disc. The scratches also rendered plaintiff Marlow's game disc useless and permanently unplayable.

Plaintiff Risk

54. In or about November 2010, plaintiff Risk purchased an Xbox 360 from a Sam's Club store within the state of Michigan.

55. In or about November 2010, plaintiff Risk exchanged his first Xbox 360 with a brand new Xbox 360 at Sam's Club, due to the scratched game disc problem.

56. In or about November 2010, plaintiff Risk purchased Xbox 360 games including "Fallout: New Vegas" and "Tiger Woods PGA Tour 11."

57. Both of these games were scratched by the Xbox 360 through no fault of Risk's own. The scratches on plaintiff Risk's game discs caused his Xbox 360 to

freeze and prevent individual profiles from being saved when using the game discs. The scratches also rendered his game discs useless and permanently unplayable.

58. In or about November 2010, plaintiff Risk contacted Microsoft Tech Support who instructed him to test the Xbox 360 by inserting another game disc in it. Upon following these instructions, the Xbox 360 rendered that game disc unreadable through no fault of Risk's own. In or about November 2010, plaintiff Risk contacted Microsoft Tech Support again. Once again, Microsoft instructed plaintiff to test his Xbox 360 machine by inserting another disc into it. As before, the Xbox 360 rendered the new disc unreadable through no fault of Risk's own.

59. Microsoft Tech Support then told plaintiff Risk about their Disc Replacement Program. However, they refused to replace his game discs because they were manufactured by third party entities, and not by Microsoft.

60. Microsoft never replaced plaintiff Risk's damaged game discs or reimbursed him for the cost of those discs.

FIRST CAUSE OF ACTION

BREACH OF EXPRESS WARRANTY

(Asserted on behalf of the Nationwide Console Class)

61. Plaintiffs re-allege the preceding paragraphs as if set forth here.

62. Defendants have an Agreement with the Class known as the "Product Warranty: Xbox 360 Video Game and Entertainment System" (the "Express Warranty"). The Express Warranty provides:

> One Year Express Warranty on Console. Subject to the terms and conditions of this Limited Warranty, Microsoft warrants to you only (the original retail purchaser) that, during the Warranty Period and under normal use and service, the Xbox® Console will substantially conform to the printed user instruction materials packaged with the Console.

63. The Express Warranty further provides: "If you acquired the Xbox Product in the United States, the laws of the State of Washington, U.S.A., will apply to this Limited Warranty."

64. The Express Warranty seeks to limit Microsoft's liability, disclaim any warranties and limit the Class's remedies. However, these limitations and disclaimers are unenforceable under Washington law because they are procedurally unconscionable in that the limitations and disclaimers are not specifically negotiated between defendants and each member of the Class.

65. Further, the limitations and disclaimers contained in the Express Warranty are unenforceable under Washington law as substantively unconscionable in that the limited remedy provided to the Class under the Express Warranty fails of its essential purpose because it deprives the Class of the substantive value of its bargain due to an undiscoverable defect.

66. Microsoft's conduct in selling and marketing Xbox 360s with ODDs that damage game discs under normal use and Microsoft's failure to repair or replace all Xbox 360s with defective ODDs is a breach of the terms of the Express Warranty as well as Microsoft's obligation of good faith and fair dealing.

67. As a direct and proximate result of Microsoft's breach of the Express Warranty, plaintiffs and the Class have been damaged in an amount to be determined at trial but in excess of an aggregate amount of $5,000,000.

68. Plaintiffs and the Class are also entitled to declaratory and injunctive relief requiring Microsoft to repair or replace all Xbox 360 DVD drives which have been damaged or which threaten to damage discs inserted in them.

69. Affording Microsoft a reasonable opportunity to cure its breach of express warranty would be unnecessary and futile. At the time of sale of the Xbox 360, Microsoft should have known, or was reckless in not knowing of the Xbox 360's defects, but nonetheless failed to rectify the situation and/or disclose the defects. Under the circumstances, affording Microsoft notice and a reasonable opportunity to cure its breach of warranty is excused and thereby deemed satisfied.

70. In the alternative, Plaintiffs' prior complaints against Microsoft suffice to give Microsoft notice and an opportunity to cure, however Microsoft has failed to cure the breaches of implied warranty.

71. In the alternative, Plaintiffs and the Class provided Microsoft with notice of their and the putative Class members' warranty claims by virtue of the letter sent to Microsoft on February 18, 2011, a copy of which is attached hereto as Exhibit A.

SECOND CAUSE OF ACTION

BREACH OF IMPLIED WARRANTY

(Asserted on behalf of the Nationwide Console Class)

72. Plaintiffs re-allege the preceding paragraphs as if set forth here.

73. Defendants have an Agreement with the Class known as the "Implied Warranty: Xbox 360 Video Game and Entertainment System" (the "Implied Warranty"). The Implied Warranty provides:

> Implied Warranty. You may also have an implied warranty and/or condition under the laws of some jurisdictions, which is hereby limited to the duration of the Warranty Period. Some jurisdictions do not allow limitations on how long an implied warranty or condition lasts, so the foregoing limitation may not apply to you.

74. The Uniform Commercial Code § 2-314 provides that, unless excluded or modified, a warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Microsoft marketed, promoted, manufactured and/or sold the Xbox 360 and placed it into the stream of commerce, and thus privity exists between Plaintiffs and Microsoft. Microsoft knew or had reason to know of the ordinary use for which the Xbox 360 was purchased, and impliedly warranted that the Xbox 360 was of merchantable quality and fit for such use as other consumer electronic devices. Contrary to these representations, the Xbox 360 is defective in that the Xbox 360's ODD can damage game discs under normal use.

75. At all times, the states listed below, including the District of Columbia, have codified and adopted the provisions of the Uniform Commercial Code governing the implied warranty of merchantability: Ala. Code § 7-2-314; Alaska Stat. § 45.02.314; Ariz. Rev. Stat. § 47-2314; Ark. Code § 4-2-314; Cal. Com. Code § 2314; Colo. Rev. St § 4-2-314; Conn. Gen. Stat. § 42a-2-314; 6 Del. C. § 2-314; D.C. Code § 28:2-314;

Fla. Stat. § 672.314; Ga. Code § 11-2-314; Haw. Rev. Stat. § 490:2-314; Idaho Code § 28-2-314; 810 Ill. Comp. Stat. 5/2-314; Ind. Code § 26-1-2-314; Iowa Code § 554.2314; Kan. Stat. § 84-2-314; Ky. Rev. Stat. § 355.2-314; La. Civ. Code art. § 2520; 11 Me. Rev. Stat. § 2-314; Md. Code § 2-314; Mass. Gen. Laws Ch. 106 § 2-314; Mich. Comp. Laws § 440.2314; Minn. Stat. § 336.2-314; Miss. Code § 75-2-314; Mo. Rev. Stat. § 400.2-314; Mont. Code § 30-2-314; Neb. Rev. Stat. U.C.C. § 2-314; Nev. Rev. Stat. U.C.C § 104.2314; N.H. Rev. § 382-A:2-314; N.J. Stat. § 12A:2-314; N.M. Stat. § 55-2-314; N.Y. U.C.C. Law § 2-314; N.C. Gen. Stat. § 25-2-314; N.D. Stat § 41-[illegible]-314; Ohio Rev. Code § 1302.27; Okla. Stat. tit. 12A § 2-314; Or. Rev. Stat. § 72.3140; 13 Pa. Stat. § 2314; R.I. Gen. Laws § 6A-2-314; S.C. Code § 36-2-314; S.D. Stat. § 57A-2-314; Tenn. Code § 47-2-314; Tex. Bus. & Com. Code § 2-314; Utah Code § 70A-2-314; Va. Code § 8.2-314; Vt. Stat. 9A § 2-314; W. Va. Code § 46-2-314; Wash. Rev. Code § 62A 2-314; Wis. Stat. § 402.314; and Wyo. Stat. § 34.1-2-314.

76. As designers, manufacturers, producers, marketers and/or sellers of the Xbox 360, Microsoft is a "merchant" within the meaning of the various states' commercial codes governing the implied warranty of merchantability.

77. Microsoft designed, manufactured, distributed, marketed and/or sold the Xbox 360 and represented to Plaintiffs and other members of the Nationwide Console Class that it was of merchantable quality and fit for use as a gaming console.

78. The Xbox 360 is a "good," as defined in the various states' commercial codes governing the implied warranty of merchantability.

79. As merchants of the Xbox 360, Microsoft knew that purchasers relied upon it to design, manufacture and/or sell Xbox 360s that would not damage game discs during normal use.

80. Microsoft designed, manufactured and/or sold Xbox 360s to consumers, and they knew that such products would be used by consumers in a home environment where minor shocks and vibrations are routinely administered to consumer products during the course of normal use and are not expected to result in damage to game discs.

81. At the time that Microsoft designed, manufactured, sold and/or distributed the Xbox 360, Microsoft knew the purpose for which the product was intended and impliedly warranted that the product was of merchantable quality; was free of design defects; and was safe and fit for its ordinary purpose—as a device that played Xbox video game discs.

82. Microsoft breached its implied warranties in connection with the sale of the Xbox 360 to Plaintiffs and the other members of the Nationwide Console Class. The Xbox 360 was and is not safe and fit for its ordinary purposes which involve playing Xbox video game discs. It was and is not free of defects, as evidenced by the scratching of game discs during normal use of the Xbox 360.

83. Affording Microsoft a reasonable opportunity to cure its breaches of warranties would be unnecessary and futile. At the time of sale of the Xbox 360, Microsoft should have known, or was reckless in not knowing of the Xbox 360's lack of merchantability and unfitness for ordinary use, but nonetheless failed to rectify the situation and/or disclose the defects. Under the circumstances, affording Microsoft notice and a

reasonable opportunity to cure its breach of warranties is excused and thereby deemed satisfied.

84. In the alternative, certain of Plaintiffs' prior complaints to Microsoft suffice to give Microsoft notice and an opportunity to cure, but Microsoft has failed to cure the breaches of implied warranty.

85. In the alternative, the Class provided Microsoft with notice of their and the putative Class members' warranty claims by virtue of the letter sent to Microsoft on February 18, 2011, a copy of which is attached hereto as Exhibit A.

86. As a direct and proximate result of Microsoft's breach of implied warranties, Plaintiffs and other members of the Nationwide Console Class are entitled to damages available under applicable law, including, but not limited to, the purchase price of the Xbox 360 and the replacement of any game discs damaged by the Xbox 360.

THIRD CAUSE OF ACTION

VIOLATION OF THE MAGNUSON-MOSS WARRANTY-FEDERAL TRADE COMMISSION IMPROVEMENT ACT

(15 U.S.C. §§ 2301 *et seq.*)

(Asserted on behalf of the Nationwide Console Class)

87. Plaintiffs re-allege the preceding paragraphs as if set forth here.

88. Plaintiffs assert this cause of action on behalf of themselves and all other members of the Nationwide Console Class.

89. Plaintiffs are "consumers" within the meaning of the Magnuson-Moss Warranty—Federal Trade

Commission Improvement Act, 15 U.S.C. § 2301(3) ("Magnuson-Moss Warranty Act").

90. Microsoft is a "supplier" and "warrantor" within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(4)-(5).

91. The Xbox 360 is a "consumer product" within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(1).

92. As set forth more fully in the Second Cause of Action, Microsoft sold Xbox 360s subject to the implied warranty of merchantability in the jurisdictions listed in the Second Cause of Action, which is an "implied warranty" within the meaning of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(7). Microsoft breached its implied warranty of merchantability by selling Xbox 360s that were defective in that they scratched game discs during normal use and were unsafe for use as video game consoles. The Xbox 360s were not safe and fit for their ordinary purposes which involved the playing of Xbox video game discs. They were not free of defects, as evidenced by the scratching of game discs experienced by thousands of users during normal use.

93. The amount in controversy of Plaintiffs' individual claims meets or exceeds the sum of $25. The amount in controversy of this action exceeds the sum of $50,000, exclusive of interest and costs, computed on the basis of all claims to be determined in this lawsuit.

94. Affording Microsoft a reasonable opportunity to cure its breaches of warranties would be unnecessary and futile. At the time of sale of the Xbox 360, Microsoft should have known or was reckless in not knowing of the Xbox 360's lack of merchantability and unfitness for ordinary use, but nonetheless failed to

rectify the situation and/or disclose the defects. Under the circumstances, affording Microsoft notice and a reasonable opportunity to cure its breach of warranties is excused and thereby deemed satisfied.

95. In the alternative, certain of Plaintiffs' prior complaints to Microsoft suffice to give Microsoft notice and an opportunity to cure, however Microsoft has failed to cure the breaches of implied warranty.

96. In the alternative, the Class provided Microsoft with notice of their and the putative Class members' warranty claims by virtue of a letter sent to Microsoft on February 18, 2011, a copy of which is attached hereto as Exhibit A.

97. As a direct and proximate result of Microsoft's breach of implied warranties and consequent violations of the Magnuson-Moss Warranty Act, Plaintiffs and other members of the Nationwide Console Class are entitled to damages available under applicable law, including, but not limited to, the purchase price of the Xbox 360 and replacement of all game discs damaged during normal use.

FOURTH CAUSE OF ACTION

VIOLATION OF THE CALIFORNIA UNFAIR COMPETITION LAW "UCL"

(Cal. Bus. & Prof. Code §§ 17200 *et seq.*)

(Asserted on behalf of the California State Subclass)

98. Plaintiffs re-allege the preceding paragraphs as if fully set forth herein.

99. Plaintiffs Danzig and Jarrett assert this cause of action on behalf of themselves and other members of the California State Subclass.

100. California Business and Professions Code § 17200 prohibits any "unfair, deceptive, untrue or misleading advertising." For the reasons set forth above, Microsoft engaged in unfair, deceptive, untrue and misleading advertising in violation of California Business and Professions Code § 17200, in that Defendants' omissions in their representations and advertising were likely to deceive the public as to the safety of the Xbox 360.

101. Microsoft has engaged in unfair and unlawful business practices in two independent manners: (1) marketing and selling the Xbox 360 with design and/or manufacturing defects that had the capacity to and, in many cases, did actually cause damage to game discs during ordinary and expected use; and (2) omitting to inform consumers of these defects and risks.

102. Microsoft omitted to inform consumers that the Xbox 360 has a design and/or manufacturing defect and that the defect had the capacity to and, in many cases, did actually cause damage to game discs during ordinary and expected use for the purpose of inducing Plaintiffs Danzig and Jarrett and the other members of the California State Subclass to purchase the Xbox 360.

103. The facts omitted by Microsoft to Plaintiffs Danzig and Jarrett and the other members of the California State Subclass are material facts that a reasonable person would have considered important in deciding whether or not to purchase and/or use the Xbox 360.

104. Plaintiffs Danzig and Jarrett and the other members of the California State Subclass justifiably acted or relied to their detriment on the undisclosed

facts as evidenced by their purchase and/or use of defective Xbox 360s.

105. Had Plaintiffs Danzig and Jarrett and the other members of the California State Subclass known of the design defect, they would not have purchased and/or used the Xbox 360.

106. By engaging in the above-described acts and practices, Microsoft has committed one or more acts of unfair competition within the meaning of Business and Professions Code § 17200.

107. Microsoft's acts and practices have deceived and/or are likely to deceive members of the consuming public and members of the California State Subclass.

108. Microsoft sold Plaintiff Danzig and Jarrett and the other members of the California State Subclass and other consumers Xbox 360s with defects that have rendered the Xbox 360s unusable for the purpose for which they were sold.

109. The injury to consumers by this conduct is greatly outweighed by any alleged countervailing benefit to consumers or competition under all of the circumstances. Moreover, because it was Microsoft alone that was in a position to know of the defects, the injury is not one that Plaintiffs Danzig and Jarrett and the other members of the California State Subclass could have reasonably avoided.

110. Microsoft's acts and practices are unfair and unlawful because they violate California Civil Code §§ 1709 and 1710, California Commercial Code § 2313, and the common law.

111. Plaintiffs Danzig and Jarrett and the other members of the California State Subclass suffered an injury in fact and lost money and property as a direct

and proximate result of Microsoft's violations of the foregoing California statutes.

112. Plaintiffs Danzig and Jarrett and the other members of the California State Subclass have been damaged and are entitled to all of the damages, remedies, fees, and costs available under Business and Professions Code §§ 17200 *et seq*.

113. Plaintiffs Danzig and/or Jarrett and the other members of the California State Subclass will provide or have already provided any required notice to appropriate entities regarding Microsoft's unfair, unlawful and deceptive trade practices.

FIFTH CAUSE OF ACTION

VIOLATION OF THE CALIFORNIA CONSUMERS LEGAL REMEDIES ACT "CLRA"

(Cal. Civ. Code §§ 1750 *et seq*.)

(Asserted on behalf of the California State Subclass)

114. Plaintiffs re-allege the preceding paragraphs as if fully set forth herein.

115. Plaintiffs Danzig and Jarrett assert this cause of action on behalf of themselves and other members of the California State Subclass.

116. This claim arises under the California Consumer Legal Remedies Act, California Civil Code §§ 1750 *et seq*.

117. At all relevant times, Jarrett, Danzig and the other members of the California State Subclass were "consumers" as that term is defined in California Civil Code § 1761(d).

118. At all relevant times Xbox 360s constituted "goods" as that term is defined in California Civil Code § 1761(a).

119. At all relevant times, Microsoft constituted a "person" as that term is defined in California Civil Code § 1761(c).

120. The purchase of Xbox 360s by Plaintiffs Danzig and Jarrett and the other members of the California State Subclass constituted "transactions" as that term is defined in California Civil Code § 1761(e).

121. At all relevant times, Microsoft provided "services" to Plaintiffs Danzig and Jarrett and the other members of the California State Subclass within the meaning of California Civil Code § 1761(b).

122. The CLRA provides in relevant part that the

> following methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful: (5) representing that goods . . . have . . . approval, characteristics, uses, benefits . . . which they do not have; . . . (7) Representing that goods . . . are of a particular standard, quality or grade . . . if they are of another.

Cal. Civ. Code § 1770(a)(5), (7).

123. Microsoft made uniform representations that the Xbox 360 was an advanced gaming console that would perform as represented and was an appropriate player of Xbox game discs.

124. But Microsoft omitted to inform consumers that the Xbox 360 has a design and/or manufacturing defect and that the design defect had the capacity to

and, in many cases, did actually damage game discs during normal and expected use for the purpose of inducing Plaintiffs Danzig and Jarrett and the other members of the California State Subclass to purchase Xbox 360s.

125. It was Microsoft alone that was in a position to know that the Xbox 360s have a defect and that the defect had the capacity to and, in many cases, did actually damage game discs during normal and expected use. These facts were not known to Plaintiffs Danzig and Jarrett and the other members of the California State Subclass. Microsoft's exclusive access to these material facts gave rise to a duty to disclose such facts, which it failed to perform.

126. The facts omitted by Microsoft to Plaintiffs Danzig and Jarrett and the other members of the California State Subclass are material facts that a reasonable person would have considered important in deciding whether or not to purchase Xbox 360.

127. Plaintiffs Danzig and Jarrett and the other members of the California State Subclass justifiably acted or relied to their detriment on the undisclosed facts as evidenced by their purchase and/or use of the defective Xbox 360.

128. Had Plaintiffs Danzig and Jarrett and the other members of the California State Subclass known that the Xbox 360 defect had the capacity to and, in many cases, did actually damage game discs during normal and expected use they would not have purchased and/or used the Xbox 360.

129. As a direct and proximate result of Microsoft's violations of the foregoing laws, Plaintiffs Danzig and Jarrett and the other members of the California State Subclass have been injured.

130. The California State Subclass has been damaged and is entitled to all of the damages, remedies, fees, and costs available under California Civil Code § 1780.

131. In accordance with California Civil Code § 1782(a), on February 18, 2011, Plaintiff's counsel served Microsoft with notice of its alleged violations of the CLRA by certified mail, return receipt requested. A true and correct copy of that notice is attached hereto as Exhibit A.

132. On March 23, 2011, Microsoft replied in a letter (attached hereto as Exhibit B), which refused to provide appropriate correction, repair, replacement, or other remedy.

SIXTH CAUSE OF ACTION

VIOLATION OF THE ILLINOIS CONSUMER FRAUD ACT ("ICFA")

(815 Ill. Comp. Stat. 505/1 et seq.)

(Asserted on behalf of the Illinois State Subclass)

133. Plaintiffs re-allege the preceding paragraphs as if set forth fully herein.

134. Plaintiff Seth Baker asserts this cause of action on behalf of himself and all other members of the Illinois State Subclass.

135. The ICFA is codified at 815 Ill. Comp. Stat. 505/1 *et seq.* The ICFA provides consumers with a comprehensive procedure for redressing the violations of applicable law. Accordingly, the conduct at issue in this case falls within the scope of the ICFA.

136. Plaintiff Seth Baker and other members of the Illinois State Subclass are "consumers" within the meaning of the ICFA.

137. Microsoft engaged in trade and/or commerce within the meaning of the ICFA.

138. The ICFA provides that

> Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby.

815 Ill. Comp. Stat. 505/2.

139. The ICFA further provides a private right of action to any person "who suffers actual damage as a result of a violation of this Act committed by any other person." 815 Ill. Comp. Stat. 505/10a.

140. Microsoft has a statutory duty to refrain from unfair acts or practices in the design, development, promotion, sale and/or manufacture of the Xbox 360.

141. Microsoft omitted to inform consumers that the Xbox 360 has a design and/or manufacturing defect and that the design defect had the capacity to and, in many cases, did actually damage game discs during normal and expected use for the purpose of inducing Plaintiffs Baker and the other members of the Illinois State Subclass to purchase Xbox 360s.

142. It was Microsoft alone that was in a position to know that the Xbox 360s have defects and that the defects had the capacity to and, in many cases, did actually damage game discs during normal and expected use, facts not known to Plaintiff Baker and the other members of the Illinois State Subclass. Microsoft's exclusive access to these material facts gave rise to a duty to disclose such facts to Plaintiff Baker and the other members of the Illinois State Subclass, which Microsoft failed to perform.

143. Further, Microsoft compounded these unfair acts by instituting their limited disc replacement program. Microsoft offered to replace game discs that its own undisclosed defects had permanently damaged—but only for games that Microsoft itself had published, and only for a $20.00 charge.

144. Microsoft committed these unfair practices as defined by 815 Ill. Comp. Stat. 505/2, with the intent to induce Plaintiff Baker and the other members of the Illinois State Subclass to rely on those unfair practices in deciding to purchase and use Xbox 360s. Microsoft committed those unfair practices during the course and conduct involving trade and commerce. 815 Ill. Comp. Stat. 505/2.

145. These practices offend public policy, are unethical, oppressive and unscrupulous, and cause substantial injury to consumers.

146. The unfair practices were carried out through sales literature, including internet advertising; through replacements or failures to replace damaged disks; and though sales of products bearing the Xbox 360 logo on the internet and at various stores in Illinois.

147. As a direct and proximate result of Microsoft's unfair practices in violation of the ICFA, Plaintiff Baker and the other members of the Illinois State Subclass have been injured.

148. Plaintiff Baker and the members of the Illinois State Subclass have been damaged and are entitled to all of the damages, remedies, fees, and costs available under the ICFA.

149. Plaintiff Baker and/or the other members of the Illinois State Subclass will provide or have already provided any required notice to appropriate entities regarding Microsoft's unfair and deceptive trade practices.

SEVENTH CAUSE OF ACTION

VIOLATION OF THE MICHIGAN CONSUMER PROTECTION ACT ("MCPA")

(Mich. Comp. Laws §§ 445.901 *et seq.*)

(Asserted on behalf of the Michigan State Subclass)

150. Plaintiffs re-allege the preceding paragraphs as if set forth fully here.

151. Plaintiff Mark Risk asserts this cause of action on behalf of himself and all other members of the Michigan State Subclass.

152. The Michigan Consumer Protection Act ("MCPA") is codified at Mich. Comp. Laws §§ 445.901 *et seq.*

153. Plaintiff Risk and the other members of the Michigan State Subclass are "persons" as that term is defined by the MCPA. Mich. Comp. Laws § 449.102(d).

154. The MCPA authorizes any "person who suffers loss as a result of a violation of this act [to] bring a

class action on behalf of persons residing or injured in this state for the actual damages caused by . . . [a] method, act, or practice in trade or commerce defined as unlawful under" the MCPA. Mich. Comp. Laws § 445.911.

155. The MCPA describes "unfair, unconscionable, or deceptive methods, acts, or practices in conduct of trade or commerce" as including:

> (c) Representing that goods or services have . . . characteristics, uses, [or] benefits . . . that they do not have. . . . (e) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another. . . . (n) Causing a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction. . . . (s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer. . . . (bb) Making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is. (cc) Failing to reveal facts that are material to the transaction in light of representations of fact made in a positive manner.

Mich. Comp. Laws § 445.903.

156. Microsoft committed one or more unfair and deceptive acts and practices as defined by the above-quoted provisions of Mich. Comp. Laws § 445.903, with the intent to induce Plaintiff Risk and the other

members of the Michigan State Subclass to rely on those unfair and deceptive acts and practices in deciding to purchase and use Xbox 360s. Microsoft committed those unfair and deceptive acts and practices during trade and commerce. Mich. Comp. Laws § 445.902(g).

157. Thus, Microsoft violated the MCPA by:

a. Representing that the Xbox 360 had characteristics, and/or benefits that they do not have, in that Xbox 360s scratch game discs such that they prevent the discs from functioning properly and, in many cases, scratch the discs so severely as to render them unusable;

b. Representing that the Xbox 360 are of a particular standard and quality in that they allegedly will not damage game discs, when they do cause such damage;

c. Causing a probability of confusion and of misunderstanding as to the legal rights, obligations, or remedies of Plaintiff Risk and the rest of the Michigan State Subclass concerning their rights under the Microsoft disc replacement program;

d. Failing to reveal material facts concerning the propensity of the Xbox 360 to damage game discs, the omission of which mislead and/or deceived Plaintiff Risk and the Michigan State Subclass. That fact could not reasonably be known by Plaintiff Risk and the Michigan State Subclass when they purchased or otherwise acquired their Xbox 360s; and

e. Representing that the Xbox 360 could play game discs without damaging them. The

statements of fact were material to the transactions such that Plaintiff Risk and the Michigan State Subclass reasonably believed the represented or suggested state of affairs to be other than it actually was.

158. Plaintiff Risk and the rest of the members of the Michigan State Subclass justifiably relied upon the unfair and deceptive acts and practices of and by Microsoft in deciding to purchase the Xbox 360.

159. Plaintiff Risk and all other members of the Michigan State Subclass were exposed to the same or substantially similar misrepresentations by seeing the same sales literature, including internet advertising, and forms and in sales of products bearing the Xbox 360 logo at various stores and on the Internet in Michigan.

160. Had Plaintiff Risk and the other members of the Michigan State Subclass known that the Xbox 360 defect had the capacity to and, in many cases, did actually damage game discs during normal and expected use, they would not have purchased and/or used the Xbox 360.

161. As a direct and proximate result of Microsoft's violations of the foregoing laws, Plaintiff Risk and the other members of the Michigan State Subclass have been injured.

162. The members of the Michigan State Subclass have been damaged and are entitled to all of the damages, remedies, fees, and costs available under the MCPA.

163. Plaintiff Risk and/or the other members of the Michigan State Subclass will provide or have already provided any required notice to appropriate entities

regarding Microsoft's unfair and deceptive trade practices.

EIGHTH CAUSE OF ACTION

VIOLATION OF THE NEW YORK CONSUMER PROTECTION

FROM DECEPTIVE PRACTICES ACT

(N.Y. Gen. Bus. Law § 349)

(Asserted on behalf of the New York State Subclass)

164. Plaintiffs re-allege the preceding paragraphs as if set forth fully here.

165. Plaintiff Jesse Bernstein asserts this cause of action on behalf of himself and all other members of the Michigan State Subclass.

166. The New York Consumer Protection from Deceptive Practices Act is codified at New York General Business Law § 349.

167. New York General Business Law § 349 provides: "Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful."

168. Microsoft violated New York General Business Law § 349 by marketing, including labeling, the Xbox 360 in a misleading way regarding facts material to the Xbox 360, and by failing to reveal facts material to the Xbox 360, to Plaintiff Bernstein and the rest of the members of the New York State Subclass.

169. Microsoft engaged in such deceptive acts and practices and false advertising with the intent to induce Plaintiff Bernstein and the rest of the members of the New York State Subclass to rely on those

deceptive acts and practices and false advertising when they decided to purchase and use Xbox 360s. Microsoft committed those deceptive acts and practices and false advertising during business, trade and commerce.

170. Plaintiff Bernstein and the rest of the New York State Subclass justifiably acted or relied to their detriment on the representations, concealment and/or non-disclosed facts as evidenced by their purchase and/or use of defective Xbox 360s.

171. Plaintiff Jesse Bernstein and all other members of the New York State Subclass were exposed to the same misrepresentations by seeing the same sales literature, including internet advertising, and forms and in sales of products bearing the Xbox 360 logo at various stores in New York.

172. New York General Business Law § 349(h) authorizes "any person who has been injured by reason of any violation of this section [to] bring an action in his own name" to enjoin such unlawful act or practice, or to recover damages, or both. Plaintiff Jesse Bernstein and the other members of the New York State Subclass are persons authorized by New York General Business Law § 349 to bring this action.

173. Had Plaintiff Bernstein and the other members of the New York State Subclass known that the Xbox 360 defect had the capacity to and, in many cases, did actually damage game discs during normal and expected use, they would not have purchased and/or used the Xbox 360.

174. As a direct and proximate result of Microsoft's violations of the foregoing laws, Plaintiff Bernstein and the other members of the New York State Subclass have been injured.

175. The members of the New York State Subclass have been damaged and are entitled to all of the damages, remedies, fees, and costs available under New York General Business Law § 349.

176. Plaintiff Bernstein and/or the other members of the New York State Subclass will provide or have already provided any required notice to appropriate entities regarding Microsoft's unfair and deceptive trade practices.

NINTH CAUSE OF ACTION

VIOLATION OF THE WASHINGTON CONSUMER PROTECTION ACT "CPA"

(Rev. Code Wash. ch. 19.86)

(Asserted on behalf of the Nationwide Damaged Disc Subclass)

177. Plaintiffs re-allege the preceding paragraphs as if set forth fully here.

178. Plaintiffs assert this cause of action on behalf of themselves and all the rest of the members of the Nationwide Damaged Disc Subclass. The CPA is codified at Rev. Code Wash. ch. 19.86. The statute provides consumers with a comprehensive procedure for redressing the violations of applicable law. Accordingly, the conduct at issue in this case falls within the scope of the CPA.

179. The CPA declares "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" unlawful. Rev. Code. Wash. § 19.86.020.

180. The CPA further provides a private right of action to any person "injured in his or her business or property." Rev. Code Wash. § 19.86.090.

181. Microsoft had a statutory duty to refrain from unfair or deceptive acts or practices in the design, development, promotion, sale and/or manufacture of the Xbox 360.

182. Microsoft has, in the course of its business, engaged in unfair or deceptive acts or practices by: (1) marketing and selling Xbox 360s with a defect that causes damage to game discs during normal use; and (2) failing to disclose this known defect and risk.

183. Microsoft's acts or practices have been "injurious to the public interest" because they injured other persons, had the capacity to injure other persons and/or have the capacity to injure other persons. Rev. Code Wash. § 19.86.093.

184. The facts not disclosed by Microsoft to Plaintiffs and the other members of the Nationwide Damaged Disc Subclass are material facts that a reasonable person would have considered important in deciding whether or not to purchase the Xbox 360.

185. Plaintiffs and the rest of the members of the Nationwide Damaged Disc Subclass justifiably acted or relied to their detriment on the representations, concealment and/or non-disclosed facts as evidenced by their purchase and/or use of defective Xbox 360s.

186. Had Plaintiffs and the rest of the members of the Nationwide Damaged Disc Subclass known that the Xbox 360 had the capacity to and, in many cases, did actually damage their valuable game discs, they would not have purchased and/or used the Xbox 360.

187. Had Microsoft not engaged in the unfair or deceptive conduct described above, Plaintiffs and the rest of the members of the Nationwide Damaged Disc

Subclass would not have purchased, paid for, and/or used their Xbox 360s.

188. Microsoft's unfair or deceptive representations and material omissions to consumers and the public regarding the true nature of the Xbox 360 purchased and used by Plaintiffs and the rest of the members of the Nationwide Damaged Disc Subclass constituted unfair and deceptive acts and practices in violation of Rev. Code Wash. ch. 19.86.

189. As a direct and proximate result of Microsoft's violations of the CPA, Plaintiffs and the rest of the Nationwide Damaged Disc Subclass have been injured in their property.

190. Plaintiffs and the rest of the members of the Nationwide Damaged Disc Subclass have been damaged and are entitled to all of the damages, remedies, fees, and costs available under the CPA. Rev. Code Wash. § 19.86.090.

TENTH CAUSE OF ACTION

NEGLIGENCE – DESIGN DEFECT AND FAILURE TO WARN (PRODUCTS LIABILITY)

(Asserted on behalf of the Nationwide Console Class and the Nationwide Damaged Disc Subclass)

191. Plaintiffs re-allege the preceding paragraphs as if set forth fully here.

192. Plaintiffs assert this common law cause of action on behalf of themselves and all other members of the Nationwide Console Class and the Nationwide Damaged Disc Subclass.

193. Microsoft designed, manufactured, sold, and/or distributed the Xbox 360 for use in the home by

ordinary consumers with no special precautions during installation and use.

194. The Xbox 360 had the capacity to, and in many cases did, actually damage game discs during normal use when it left the hands of Microsoft.

195. Microsoft had a duty to exercise reasonable care in the design, manufacture, sale and/or distribution of the Xbox 360, including a duty to ensure that the Xbox 360 did not have the capacity to damage game discs during normal use.

196. Microsoft failed to exercise reasonable care in the design, manufacture, sale, and/or distribution, of the Xbox 360.

197. Specifically, Microsoft was negligent in its design, manufacture, testing, inspection, sale and/or distribution of the Xbox 360 in that it:

a. Failed to use reasonable care in designing and/or manufacturing the Xbox 360 so as to avoid the harm of damaging game discs during ordinary use;

b. Failed to conduct adequate quality testing of the Xbox 360 to determine the safety of the Xbox 360 prior to sale; and

c. Failed to accompany the Xbox 360 with proper warnings regarding the possibility of damaged game discs during normal use.

198. Despite the fact that Microsoft should have known that the Xbox 360 has the capacity to damage—and in many cases has damaged—game discs during normal use, Microsoft continued to market and sell the Xbox 360 to consumers, including Plaintiffs and other members of the Nationwide Console Class and the Nationwide Damaged Disc Subclass.

199. Microsoft should have known that Plaintiffs and other members of the Nationwide Console Class and the Nationwide Damaged Disc Subclass would foreseeably be put at risk and suffer damaged game discs as a result of Microsoft' s failure to warn of the likelihood of damage to game discs during normal use.

200. Microsoft's negligence proximately caused Plaintiffs and other members of the Nationwide Console Class and the Nationwide Damaged Disc Subclass to be injured in that their game discs were damaged by the Xbox 360 during normal use.

201. Plaintiffs do not allege negligence claims based on an injury to the Xbox 360 itself; Plaintiffs' negligence claims relate to injuries to property that they and members of the Nationwide Console Class and the Nationwide Damaged Disc Subclass sustained as a result of the Xbox 360.

ELEVENTH CAUSE OF ACTION

STRICT LIABILITY - DESIGN DEFECT AND FAILURE TO WARN

(PRODUCTS LIABILITY)

(Asserted on behalf of the Nationwide Console Class and the Nationwide Damaged Disc Subclass)

202. Plaintiffs re-allege the preceding paragraphs as if set forth fully here.

203. Plaintiffs assert this common law cause of action on behalf of themselves and all other members of the Nationwide Console Class and the Nationwide Damaged Disc Subclass.

204. Microsoft designed, manufactured, sold and/or distributed Xbox 360s.

205. The Xbox 360s that Microsoft designed, manufactured, sold and/or distributed were defective in design and/or manufacturing. Further, the Xbox 360s were defective when they left the control of Microsoft such that: (1) the foreseeable risks exceeded the benefits associated with the design or manufacturing with same, or (2) they were unreasonably dangerous, more dangerous than an ordinary consumer would expect, and/or more dangerous than other gaming consoles, including but not limited to the Nintendo Wii and the Sony PlayStation 3.

206. Microsoft should have known that the Xbox 360 contained a non-obvious danger to game discs during normal use. Moreover, the potential for damaging gamed discs during normal use was a known danger.

207. Microsoft knew that Plaintiffs and other members of the Nationwide Console Class and the Nationwide Damaged Disc Subclass would use the products without first inspecting them for unreasonably dangerous ODD designs that may cause damage to game discs during normal use. However, Microsoft failed to inform Plaintiffs and other members of the Nationwide Console Class and the Nationwide Damaged Disc Subclass as to the risk of damage to game discs that the Xbox 360's ODD design posed.

208. The Xbox 360 was expected to and did reach Plaintiffs and other members of the Nationwide Console Class and the Nationwide Damaged Disc Subclass without substantial change in condition.

209. The Xbox 360s that Microsoft designed, manufactured, sold and/or distributed were defective due to inadequate warning and inadequate inspection

and testing, and inadequate reporting regarding the results of quality-control testing and safety inspections, or lack thereof.

210. Had Plaintiffs and other members of the Nationwide Console Class and the Nationwide Damaged Disc Subclass been warned about the capacity of the Xbox 360s to damage game discs during normal use, they would not have purchased, acquired, or otherwise obtained the Xbox 360s, nor would they have used the Xbox 360s.

211. As a direct and proximate result of the defective condition of the Xbox 360 as designed, manufactured, sold and/or distributed by Microsoft, Plaintiffs and other members of the Nationwide Console Class and the Nationwide Damaged Disc Subclass have been injured.

212. Plaintiffs do not allege strict liability claims based on an injury to the Xbox 360 itself; Plaintiffs' strict liability claims relate to injuries that they and members of the Nationwide Console Class and the Nationwide Damaged Disc Subclass sustained as a result of the Xbox 360.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of all those similarly situated, pray for judgment against Microsoft as follows:

A. Determine that this action may be maintained as a class action with respect to a Nationwide Console Class, Nationwide Damaged Disc Subclasses, and with Subclasses corresponding to the several states' laws, pursuant to the appropriate subsections of Rule 23 of the Federal Rules of Civil Procedure; that the Court

certify a class action with respect to particular issues if appropriate; that the Court designate and appoint the named Plaintiffs to serve as Class Representatives, designate and appoint the undersigned counsel as Class Counsel, and designate and appoint Chitwood Harley Harnes LLP, Keller Rohrback L.L.P., Kopelowitz Ostrow Ferguson Weiselberg Keechl, Stritmatter Kessler Whelan Coluccio, and Wasserman Comden Casselman & Esensten LLP as Lead Class Counsel;

B. Require that Microsoft ensure that the Xbox 360's Optical Disc Drive lack the capacity to damage game discs during normal use;

C. Require Microsoft to submit product testing results on a regular basis to ensure that their products lack the capacity to damage game discs during normal use;

D. Award damages to Plaintiffs and members of the Class and Subclasses for damage to their game discs;

E. Award costs to Plaintiffs and members of the Class and Subclasses for reimbursement of the costs of replacement game discs damaged by the Xbox 360 during normal use;

F. Award damages to Plaintiffs and members of the Class and Subclasses for payments, in whatever form, rendered for their unreasonably dangerous Xbox 360s;

G. Declare the conduct of Microsoft as alleged herein to be unlawful;

H. Grant Class and Subclass Members awards of actual, compensatory, treble, punitive and/or

exemplary damages in such amount to be determined at trial and as provided by applicable law;

I. Grant Class and Subclass Members their costs of suit, including reasonable attorneys' fees, costs, and expenses as provided by law;

J. Grant Class and Subclass Members both pre-judgment and post-judgment interest as provided by law; and

K. Grant Class and Subclass Members such other, further, and different relief as the nature of the case may require or as may be determined to be just, equitable, and proper by this Court.

DATED this 27th day of June, 2011

KELLER ROHRBACK L.L.P.

By /s/ Amy Williams-Derry
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Attorneys for Plaintiffs

EXHIBIT A

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February 18, 2011

7008 0150 0000 5246 1243
VIA CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

Legal Department
MICROSOFT CORPORATION
1 Microsoft Way
Redmond, WA 98052

Re: Microsoft Xbox 360 Gaming Consoles

To Whom It May Concern:

This firm, along with our co-counsel Keller Rohrback LLP, Chitwood Harley Harms LLP, and Kabateck Brown Kellner LLP, represent Seth Baker, Matthew Danzig, Nathan Marlow, Jesse Bernstein and Mark Risk ("Plaintiffs"). We write on behalf of our clients as well as all other similarly situated purchasers of your Microsoft Xbox 360 gaming consoles ("Xbox 360"), who, as a result of purchasing the Xbox 360, have been subjected to certain unlawful business practices committed by Microsoft Corporation ("You" or "Your").

I. FACTUAL BACKGROUND

You wrongfully profit from the marketing, advertising, distribution and sale of Xbox 360 gaming consoles by failing to warn consumers that the Xbox 360 is defective. Specifically, when an Xbox 360 is tilted or swiveled—even slightly—while a game disc is in the built-in Optical Disc Drive ("ODD"), ODD components can contact the game disc, creating a distinctive circular "gouge" on the underside of the disc.

For example, in or about November 2006, Matthew Danzig purchased an Xbox 360 in California. Between November 2006 and May 2008, he purchased various Xbox 360 games, including "Grand Theft Auto IV," "Madden NFL 07," "Madden NFL 08," and "Gears of War." All four games were scratched by the Xbox 360, permanently damaging them.

In or about November 2007, Seth Baker purchased an Xbox 360 and an Xbox 360 game titled "Call of Duty: Modern Warfare 2" in Illinois. When he played the game, the Xbox 360 scratched the disc, permanently damaging it.

In or about November 2010, Mark Risk purchased an Xbox 360 in Michigan. That same month, he exchanged his first Xbox 360 with a brand new Xbox 360 due to the scratched game disc problem. Mr. Risk also purchased various Xbox 360 games, including "Fallout: New Vegas" and "Tiger Woods PGA Tour 11." Both games were scratched and rendered permanently unreadable by the Xbox 360.

Mr. Risk contacted Microsoft and was instructed to insert two new game discs in the Xbox 360 in order to test the unit. Those discs were also permanently scratched. Microsoft representatives advised him that Microsoft had a replacement policy but that it would

not replace his game discs because they were not manufactured by Microsoft.

Jesse Bernstein purchased an Xbox 360 in New York. He also purchased an Xbox 360 game titled "Tom Clancy's Rainbow Six: Vegas." However, when he attempted to play the game, the disc was scratched by the Xbox 360 and permanently damaged.

Finally, in or about September, 2007, Nathan Marlow purchased an Xbox 360 in Washington. In December 2008, he purchased an Xbox 360 game titled "Gears of War 2." The game was then scratched by the Xbox 360 and permanently damaged.

The scratches on the game discs used by Plaintiffs caused their Xbox 360s to freeze and prevented individual profiles from being saved when using the game discs. The Xbox 360s also rendered their game discs useless and permanently unplayable.

Disc scratches such as those experienced by Plaintiffs are caused by small movements of the Xbox 360 which cause rotating game discs to become decoupled from the ODD spindle and then crash into internal ODD components. This causes the game discs' normal functions and operations to be permanently impaired.

Xbox 360s are intended for use in the home and are depicted in Your sales literature as sitting on the floor near a television or resting on an ordinary shelf within a bookcase or home entertainment center. Your television commercials often depict users engaging in spirited movements as enthusiastically playing games which simulate, among other activities, athletic competition (e.g., "2010 FIFA World Cup South Africa"), infantry warfare (e.g., "Call of Duty") or live rock music performance (e.g., "Guitar Hero").

You have recently launched the "Kinect," a peripheral device for the Xbox 360 which tracks body movements and allows users to control games though their own movements in space. Your campaign for the Kinect advises users to "Simply jump in."

The printed user instruction materials packaged with the Xbox 360 do not indicate anywhere that the Xbox 360 ODD can scratch discs due to even the smallest of movements, including the minute unintentional movements to which it is reasonably expected all consumer devices will be subjected when placed in an ordinary household environment due to vibrations or other sources of indirect force being applied to the Xbox 360.

The printed user instruction materials packaged with the Xbox 360 do not caution users to place their consoles on any special type of platform designed to isolate the console from vibrations or other sources of indirect force during normal use.

Despite numerous complaints you have received from consumers about the circular scratches to game discs, You have publicly denied the problem and have claimed that the game discs were damaged due to deliberate movement of the Xbox 360 while the discs were being played.

You have refused to recall the Xbox 360 to repair the problem with the ODD and You have refused to provide compensation to class members whose game discs were damaged by the Xbox 360 ODD.

The claims and representations made by You regarding the Xbox 360 are false, deceptive, unfair, and unconscionable.

II. LEGAL VIOLATIONS

Your failure to disclose material information violates the California's Consumer Legal Remedies Act ("CLRA"), California's False Advertising Law (California Business and Profession Code § 17500 et seq.) and California's Unfair Competition Act (California Business and Profession Code § 17200 et seq.), the Illinois Consumer Fraud and Deceptive Business Practices Act (815 Ill. Comp. Stat. 505/1 et seq.), the Michigan Consumer Protection Act (Mich. Comp. Laws §§ 445.901 et seq.), the New York Consumer Protection from Deceptive Practices Act (N. Y. Gen. Bus. Law §§ 349 and 350 et seq.), and the Washington Consumer Protection Act (Rev. Code Wash. §§ 19.86 et seq.), by, without limitation:

1) Omitting information material to a consumer's decision as to whether to purchase Xbox 360s;

2) Placing Xbox 360s for sale to the general public when the Xbox 360s do not materially conform to the product's advertisements;

3) Falsely representing that Xbox 360s have characteristics, uses, or qualities that they do not have; and

4) Fraudulently inducing consumers to purchase Xbox 360s based upon those false representations.

Moreover, Your conduct violates State express and implied warranty laws and the Magnuson-Moss Warranty (Federal Trade Commission Improvement Act, 15 U.S.C. § 2301(3)), as well as the express warranties You make in the literature You provide with the Xbox 360s, in that representations, claims, warranties and guarantees made by You regarding the Xbox 360 are false, misleading, and/or omit material

information, and the Xbox 360s are labeled, advertised, marketed, and promoted as if Xbox 360s have characteristics, uses and/or benefits which in fact the Xbox 360s do not have.

III. DEMAND FOR RELIEF

Please consider this an attempt to resolve the claims of our clients and the putative class prior to initiating litigation. Accordingly, a demand is hereby made that, within the next thirty (30) days, You do the following, or confirm in writing that You will do the following within a reasonable time:

1) Ensure that the Xbox 360's ODD lacks the capacity to damage game discs during normal use;

2) Inform consumers of the ODD defect and recall the Xbox 360 to repair the ODD defect;

3) Identify all consumers who, as a result of the ODD defect, had game disc damaged by their Microsoft Xbox 360 gaming consoles, and provide appropriate compensation to all such consumers;

4) Submit product testing results on a regular basis to ensure that the Xbox 360 lacks the capacity to damage game discs during normal use;

5) Agree to irrevocably stop all false and misleading advertising of the Xbox 360; and

6) Pay the attorney fees incurred by Mr. Danzig;

Within thirty days (30) of Your receipt of this notice, please advise us that You have either accomplished the foregoing or agree to do so within a reasonable time.

Very truly yours,

WASSERMAN, COMDEN,
CASSELMAN & ESENSTEN,
L.L.P.
/s/ Gregory B. Scarlett
GREGORY B. SCARLETT

EXHIBIT B

MONTGOMERY, MCCRACKEN, WALKER & RHOADS, LLP
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March 23, 2011

Gregory B. Scarlett, Esquire
Wasserman, Comden, Casselman
& Esensten, L.L.P.
5567 Reseda Boulevard
Suite 330
Tarzana, CA 91356

Re: Xbox 360 Consoles

Dear Mr. Scarlett:

I am writing on behalf of Microsoft Corporation in response to your letter of February 18, 2011, which purports to constitute a demand under Section 1782(a) of the California Consumers Legal Remedies Act, Cal. Civ. Code § 1782(a), and the other statutes you mention, regarding your clients Seth Baker, Matthew Danzig, Nathan Marlow, Jesse Bernstein, and Mark Risk. Your letter contains many inaccuracies and fails to comply with the CLRA's requirements.

The purpose of Civil Code § 1782(a) "is to give the manufacturer or vendor sufficient notice of the alleged defects to permit appropriate corrections or replacements." *See Outboard Marine Corp. v. Superior Court*, 52 Cal. App. 3d 30, 40 (1975). The court in *Outboard Marine* explained that the "clear intent of the act is to provide and facilitate precomplaint settlements of

consumer actions wherever possible and to establish a limited period during which such settlement may be accomplished. This clear purpose may only be accomplished by a literal application of the notice provisions." *Id.* at 41.

Your letter is too general to comply with Section 1782(a). It fails to give Microsoft sufficient information. For example, it asserts that Mr. Danzig purchased an Xbox 360 console in California "in or about November 2006" but omits the serial number and gives no description of how Mr. Danzig was using the console, and how it was moved, when his four game discs were scratched. The same is true of Mr. Baker, Mr. Marlow, and Mr. Risk. Your letter says Mr. Bernstein purchased an Xbox 360 console in New York, but fails to say when, omits the serial number, and fails to say how he was using the console, and how it was moved, when his disc was scratched.

Microsoft's design and testing, and the experience of the vast majority of Xbox 360 users whose game discs are never scratched, demonstrate that to scratch a game disc, the console must be moved suddenly with far greater force than would be encountered in normal game play and at an angle to the axis of rotation—something that will not occur in normal use. Microsoft includes a conspicuous warning in the manual, in the quick-start guide, and on a label on the front of every new console not to move the console while a disc is in the tray. Enthusiastic players who make "spirited" movements when playing active games such as Guitar Hero or those designed to be played with the Kinect sensor will have a good experience if the console is placed on a solid surface and used as the instruction manual recommends. Testing has demonstrated that floor or loudspeaker vibrations from normal game

play, even "spirited" game play with the volume turned up, will not cause an Xbox 360 console to scratch a game disc. Contrary to the assertion in your letter, "minute unintentional movements" or "vibrations" "in an ordinary household environment" do not cause disc-scratching.

Your firm, along with your co-counsel Chitwood Harley Harnes LLP, Kabateck Brown Kellner LLP, and Keller Rohrback LLP, are well aware of these facts. Your firm and these three others brought numerous putative class action lawsuits against Microsoft in 2007 that made these same allegations. On October 5, 2009, the U.S. District Court for the Western District of Washington, where five of those suits were consolidated, found that the alleged defect "actually manifests in fewer than one percent of the Xbox consoles sold." *In re Microsoft Xbox 360 Scratched Disc Litigation*, No. C07-71121-JCC, 2009 U.S. Dist. LEXIS 109075, at *20 (W.D. Wash. Oct. 5, 2009). The court denied the plaintiffs' class certification motion, in which your firm participated as co-counsel, because determining whether each consumer caused disc scratching would require "individual attention to each plaintiff on issues of law and fact." *In re Microsoft Xbox 360 Scratched Disc Litigation*, 2009 U.S. Dist. LEXIS 109075, at *22. On January 21, 2010, the U.S. Court of Appeals for the Ninth Circuit denied the petition filed by your firm and your co-counsel for permission to appeal that decision under Rule 26(f). Your threat to bring yet another class action lawsuit over this same issue raises serious concerns that you and your co-counsel are attempting to evade the finality of the court's ruling and shop for a forum you consider more favorable in which to litigate the same issues over again.

Microsoft complies with all applicable laws, including those named in your letter. Your assertion that Microsoft violated them is groundless, as you and your co-counsel are aware. The vast majority of Xbox 360 users follow the instructions in the manual, in the quick-start guide, and on the console, and have a terrific gaming experience.

Microsoft is unable to provide the relief you demand in your letter. First, Microsoft knows through its design, testing, and experience, that the Xbox 360 lacks the capacity to damage game discs during normal use and operation of the console. Second, Microsoft is unable to inform consumers of any defect in the Xbox 360 or to identify consumers who have defective consoles because the Xbox 360 console is not defective. Third, Microsoft has never engaged in false or misleading advertising of the Xbox 360 console. Finally, in these circumstances, it would be inappropriate for Microsoft to pay Mr. Danzig's attorneys' fees incurred in sending your letter.

Very truly yours,

/s/ Charles B. Casper
Charles B. Casper

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[Filed 03/27/12]

Case No. 11-cv-00722-RSM

SETH BAKER, JESSE BERNSTEIN, MATTHEW DANZIG, JAMES JARRETT, NATHAN MARLOW, and MARK RISK, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MICROSOFT CORPORATION, a Washington Corporation,

Defendant.

ORDER ON DEFENDANT'S MOTION TO STRIKE PLAINTIFFS' CLASS ALLEGATIONS

This matter comes before the Court on Defendant's motion to strike class allegations or, in the alternative, deny certification of Plaintiffs' proposed classes. Dkt. # 14. Having reviewed the motion, Plaintiffs' response, Defendant's reply, and all documents submitted in support thereof, the Court hereby GRANTS Defendant's motion and STRIKES Plaintiffs' class allegations.

I. BACKGROUND

The parties are familiar with the facts and allegations underlying this action, and the Court summarizes them here only in brief. In this putative class action, Plaintiffs claim that a video game console

manufactured by Defendant Microsoft – the Xbox 360 – is inherently defective because, when tilted or swiveled, the console gouges the game discs inserted into it, thereby rendering them permanently unplayable. Pursuant to Federal Rule 23, Plaintiffs bring this action individually and on behalf of two classes of people that they claim are similarly situated: (1) all persons in the United States who own Xbox 360 gaming consoles (the "Console Class"); and (2) all persons in the United States who had game discs damaged by their Xbox 360 gaming consoles (the "Damaged Disc Class").[1]

A. Scratched Disc Litigation

This case is identical in pertinent part to a putative class action previously pursued by Plaintiffs' counsel in which plaintiffs asserted the same claims at issue here on behalf of the same putative classes (hereinafter, the "Scratched Disc Litigation").[2] Following extensive discovery in the Scratched Disc Litigation, Hon. John C. Coughenour entered an order denying class certification. *In re Microsoft Xbox 360 Scratched Disc Litig.*, C07-1121-JCC, 2009 U.S. Dist. LEXIS 109075 (W.D. Wash. Oct. 5, 2009) (hereinafter, the "Certification Denial Order"). Although plaintiffs sought permission to appeal the Certification Denial Order, the Ninth Circuit denied that request. The

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[1] Plaintiffs purport to subdivide the Damaged Disc Class into four subclasses based upon users who reside in California, Illinois, Michigan, and New York.

[2] Although Plaintiffs here have made a handful of changes with respect to the legal claims asserted and proposed class definitions underlying the Scratched Disc Litigation, those changes are not relevant to the Court's analysis.

plaintiffs in the Scratched Disc Litigation subsequently settled their claims on an individual basis.

In the Certification Denial Order, Judge Coughenour cited to the case of *Gable v. Landrover N.A., Inc.*, a putative class action out of the Central District of California. No. CV07-0376, 2008 U.S. Dist. LEXIS 82996 (C.D. Cal. Sept. 29, 2008). Judge Coughenour found that the facts of *Gable* were analogous in pertinent part to those before the court, and that the reasoning underlying that decision was "persuasive." *Id.* at *19.

In *Gable*, the plaintiffs sought to represent a class of consumers who had purchased or leased a certain model of Land Rover. The plaintiffs alleged that all of the vehicles suffered a common manufacturing defect that caused the tires on some of the vehicles to wear out unevenly. On the basis of that alleged defect, the plaintiffs brought claims for violation of Michigan's Consumer Protection Act, breach of the vehicles' limited warranty, breach of a separate warranty applicable to the vehicles' tires, breach of the implied warranty of merchantability, and unjust enrichment.

The *Gable* court denied the plaintiffs' motion for class certification because it concluded that individual issues of damages predominated over common issues. The court based this decision upon evidence that more than half of the proposed class members had not experienced the defect at issue. *Id.* at *9. The *Gable* court also found that individual issues of causation predominated because,

> [w]ithout individual inquiry, there is no way in adjudicating this case to determine whether the need for a particular repair was based on normal wear, a defective original

> part, a defective after-market part, environmental factors such as weather or road conditions, the presence of foreign objects in the braking system, the failure of parts other than the braking system, poor workmanship by a third party, or individual driving habits.

Id. at *11.

After reciting the foregoing portions of the *Gable* opinion, Judge Coughenour determined that individual issues of damages and causation likewise precluded class certification in the Scratched Disc Litigation. As to the proposed Console Class, Judge Coughenour determined that individual issues of damages predominated because, just as in *Gable*, the alleged defect did not manifest in the majority of Xbox360 consoles sold. In fact, Judge Coughenour found that the alleged defect actually manifests in less than one percent of Xbox360 consoles sold. *See* Certification Denial Order, at *20-21.

Judge Coughenour also determined that individual issues of causation predominated as to both proposed classes because, like the situation in *Gable*, factors other than the alleged defect could have caused the damages claimed by the prospective class members. Judge Coughenour observed, for example, that a class member's dog could have knocked his or her Xbox360 console over while it was in use, or that an overzealous gamer might have unwittingly struck the machine during its operation – either of which could have caused the discs to scratch. On the basis of those observations, Judge Coughenour found that "[w]hether each user's actions constituted misuse, and whether his or her use/misuse caused the damage, would present individual issues of fact for the jury." *Id.* at *22.

Because he determined that individual issues of damages and causation predominated over common issues, Judge Coughenour held that the plaintiffs could not satisfy the class certification requirements of Federal Rule 23. As such, Judge Coughenour denied the plaintiffs' class certification motion.

B. *Wolin v. Jaguar*

Several months after dismissal of the Scratched Disc Litigation, the Ninth Circuit reversed the *Gable* decision cited to by Judge Coughenour. *Wolin v. Jaguar Land Rover North Am., LLC*, 617 F.3d 1168 (9th Cir. 2010). According to the Ninth Circuit, the *Gable* court "erred when it concluded, without discussion, that certification is inappropriate because [plaintiffs] did not prove that the defect manifested in a majority of the class's vehicles." *Id.* at 1173. As the *Wolin* court noted, "proof of the manifestation of a defect is not a prerequisite to class certification." *Id.* at 1173.

The Ninth Circuit noted, however, that claims based upon the vehicles' tire warranties – hereinafter, the "Tire Warranty Claims" or the "Tire Warranty Class" – "may not be amenable to class treatment" because "[t]ires deteriorate at different rates depending on where and how they are driven." *Id.* at 1174. As such, the *Wolin* court concluded that "[w]hether each proposed class member's tires wore out, and whether they wore out prematurely and as a result of the alleged alignment defect, are individual causation and injury issues that could make class-wide adjudication inappropriate." *Id.* at 1174.

On remand, the *Gable* court certified classes with respect to all but one of the plaintiffs' claims. Consistent with the Ninth Circuit's observations in

Wolin, the *Gable* court declined to certify the Tire Warranty Class because it concluded that individual issues of causation – e.g., driving habits, road conditions, and weather – predominate. *Gable v. Land Rover North America, Inc.*, CASE NO. SACV 07-0376 AG (RNBx), 2011 U.S. Dist. LEXIS 90774 (C.D. Cal. July 25, 2011).

C. The Instant Litigation

Plaintiffs initiated this action shortly after the Ninth Circuit's decision in *Wolin*, arguing that its reversal of *Gable* constitutes a change in the law underlying the Certification Denial Order. As such, Plaintiffs take the position that *Wolin* is binding upon this Court and that the Certification Denial Order is not. Proceeding from that premise, Plaintiffs assert that they are entitled to maintain the instant litigation notwithstanding the fact that Judge Coughenour has already refused to certify classes that are identical in pertinent part to the ones at issue here.

Defendant disagrees, arguing that *Wolin* does not constitute a change in the law and that principles of comity require adherence by this Court to Judge Coughenour's prior ruling. As such, Defendant asks the Court to strike Plaintiffs' class allegations or, alternatively, to deny class certification on the same grounds set forth in the Certification Denial Order.

II. DISCUSSION

A. Legal Standard

For over a century, federal courts have recognized that "[c]omity is not a rule of law, but one of practice, convenience and expediency. It is something more than mere courtesy, which implies only deference to

the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question." *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488-489 (1900).

The Supreme Court recently addressed the role that comity should play within the class certification context. In the case of *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), the court acknowledged the "policy concerns" that arise when class counsel makes repeated efforts to certify the same class "'by the simple expedient of changing the named plaintiff in the caption of the complaint.'" *Id.* at 2381 (citation omitted). Although the *Smith* court held that collateral estoppel principles cannot be used to bind members of putative classes that were never certified, the court expressed its expectation that "federal courts [will] apply principles of comity to each other's class certification decisions when addressing a common dispute." *Id.* at 2382. As the *Smith* court explained, "our legal system generally relies on principles of stare decisis and comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs." *Id.* at 2381.

Although the *Smith* court gave no specific guidance as to *how* lower courts should apply principles of comity within the class certification context, this comes as little surprise since the application of such principles has long been within the discretion of the court. *See, e.g., Church of Scientology v. U.S. Dept. of the Army*, 611 F.2d 738, 749 (9th Cir. 1979); *Barapind v. Reno*, 225 F.3d 1100, 1109 (9th Cir. 2000). A well-known treatise cited by the *Smith* court proposes one approach to applying principles of comity within the class certification context, stating that "a denial of

class certification should raise a rebuttable presumption against the same aggregate treatment in another court. The basis for this presumption is not preclusion but, rather, comity." ALI, Principles of the Law Aggregate Litigation, § 2.11, at p. 179 (hereinafter, "ALI § 2.11").

In the absence of any specific guidance from the Ninth Circuit or Supreme Court as to how federal courts should "apply principles of comity to each other's class certification decisions," the Court adopts the approach set forth in ALI § 2.11. As such, the Certification Denial Order gives rise to a rebuttable presumption against aggregate treatment in this action. *Id.* The critical question therefore becomes whether Plaintiffs can rebut that presumption. *Id.*

Plaintiffs assert that the Ninth Circuit's decision in *Wolin* suffices to rebut the presumption because it constitutes a change in the law relied upon by Judge Coughenour. *See* ALI § 2.11 ("[W]hen the basis for the earlier denial . . . is no longer present in a subsequent proceeding . . ., the presumption [against aggregate treatment] would be rebutted."). Defendant takes the opposite position. For the reasons set forth below, the Court concludes that *Wolin* does not rebut the presumption against aggregate treatment as to either of the proposed classes, and the Court therefore employs principles of comity in deferring to the Certification Denial Order.

B. The Damaged Disc Class

The Court easily reaches this conclusion with respect to the Damaged Disc Class because the claims its members seek to advance are analogous to the Tire Warranty Claims the *Wolin* court found "may not be amenable to class treatment."

Like the Tire Warranty Claims in *Gable*, Judge Coughenour found that the Damaged Disc Class seeks to assert claims for which individual issues of causation predominate. Judge Coughenour reasoned as follows:

> With respect to causation, the *Gable* court left open the possibility that a defective design may have contributed to the premature tire wear. The court simply found that other proximate causes may have conspired to produce that result in different ways in different cases, meaning individual issues of fact predominated. The same is true here: Just as poor parallel-parking skills and under-inflated tires may have caused a pre-existing defect to manifest in different ways, the hypothetical pet dog and guitar hero might have set in motion a chain of causes ending in disc scratching. Even if one link of that chain is a design defect, the other links are unique to each plaintiff and require individual attention. The requirements of individual attention to each plaintiff on issues of law and fact make this case an inappropriate candidate for class-action resolution.

Certification Denial Order, at *23-24.

Nothing in *Wolin* undermines that analysis. On the contrary, the Ninth Circuit employed a similar line of reasoning to conclude that the Tire Warranty Claims "may not be amenable to class treatment" because, even if the Land Rovers at issue contained a common alignment defect, "[t]ires deteriorate at different rates depending on where and how they are driven." *Wolin*, 617 F.3d at 1174. On remand, the *Gable* court declined

to certify the Tire Warranty Class for this same reason.

The discs at issue in this case are analogous to the tires at issue in *Gable / Wolin* because, as Judge Coughenour recognized, both products may be damaged for any number of reasons that are unrelated to the manufacturing defects alleged by the plaintiffs. On that basis, Judge Coughenour concluded that individual issues of causation rendered class treatment inappropriate as to the Damaged Disc Class. Because that ruling is perfectly consistent with the Ninth Circuit's holding, the *Wolin* decision does not rebut the presumption against aggregate treatment as to the Damaged Disc Class.

C. The Console Class

The Court reaches the same conclusion as to the proposed Console Class. Although Judge Coughenour declined to certify the Console Class because the overwhelming majority of the Xbox360 consoles at issue did not manifest the defect in question (and the owners of those consoles therefore did not sustain any damages), he also found that individual issues of causation rendered class treatment improper. See Certification Denial Order, at *21-24. As noted above, nothing in *Wolin* undermines Judge Coughenour's causation analysis, which forms an independently sufficient basis for the Certification Denial Order.

Plaintiffs argue that, even though the defect at issue does not express itself with respect to the vast majority of Xbox360 consoles, class certification is still appropriate because *all* Xbox360 consoles contain an *inherent defect* and "proof of the manifestation of a defect is not a prerequisite to class certification." *Wolin*, 617 F.3d at 1173.

But this argument misconstrues the pertinent language of *Wolin* and misses the central point of Judge Coughenour's causation analysis. The *Wolin* court held that manifestation of a defect is not a "prerequisite" to class certification. In other words, there are some situations in which it might be appropriate for a court to certify a class under Rule 23 even though the product defect at issue has not manifested with respect to all individual class members. That is not to say, of course, that the existence of a product defect *ipso facto requires* class certification.

On the contrary, both before and after the Ninth Circuit's decision in *Wolin*, Rule 23(b)(3) has required federal courts to undertake a "rigorous analysis" of "'whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1019 (9th Cir. 2011) (citations omitted). That analysis requires district courts to assess, among other things, whether *individual* issues of damages and causation render aggregate treatment inappropriate.

Judge Coughenour conducted such an analysis in the Scratched Disc Litigation and determined that individual issues of causation and damages did, in fact, preclude class treatment. Nowhere in the Certification Denial Order did Judge Coughenour state or imply that manifestation of a defect is a "prerequisite" to class certification. Instead, he observed that various factors unrelated to the alleged defect "might have set in motion a chain of causes ending in disc scratching." Certification Denial Order, at *23. Thus, as Judge Coughenour stated, "*[e]ven if one link of that chain is a design defect, the other links are unique to each plaintiff and require individual*

attention." Id. (emphasis added). In other words, even when taking for granted that all Xbox360 consoles contain an inherent defect, and even when assuming that a number of Xbox360 consoles actually manifested that defect, Judge Coughenour still concluded that individual issues of *causation* preclude class certification. The portions of the *Wolin* decision on which Plaintiffs rely do nothing to undermine that conclusion, and Plaintiffs have therefore failed to overcome the presumption against aggregate treatment.

It is worth noting that the Ninth Circuit declined to entertain an appeal of the Certification Denial Order at the same time it was considering *Wolin*. Plaintiffs cannot ask this Court – under the guise of a separate litigation – to step into the shoes of the Ninth Circuit and effectively overrule a fellow member of this court. Proceeding in such a manner would undermine well-settled principles of judicial comity. *See Carnegie Nat. Bank v. City of Wolf Point*, 110 F.2d 569, 573 (9th Cir. 1940) ("[T]he various judges who sit in the same court should not attempt to overrule the decisions of each other . . . except for the most cogent reasons."); *Smith*, 131 S. Ct. at 2382 (expressing an expectation that "federal courts [will] apply principles of comity to each other's class certification decisions when addressing a common dispute").

III. CONCLUSION

For all of the foregoing reasons, Defendant's motion, Dkt. # 14, is GRANTED and Plaintiffs' class allegations are hereby STRICKEN.

Dated this 27 day of March 2012.

/s/ Ricardo S. Martinez
RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

No._____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 2:11-cv-00722-RSM

SETH BAKER, JESSE BERNSTEIN, MATTHEW DANZIG, JAMES JARRETT, NATHAN MARLOW, and MARK RISK, individually and on behalf of all others similarly situated,

Plaintiffs-Petitioners,

v.

MICROSOFT CORPORATION, a Washington Corporation,

Defendant-Respondent.

PETITION FOR PERMISSION TO APPEAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 23(f)

The United States District Court for the Western District of Washington The Honorable Ricardo S. Martinez, District Judge

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QUESTION PRESENTED

Plaintiffs allege that every Microsoft Xbox 360 contains an inherent design defect that breaches a uniform warranty. They seek to certify a class of Xbox purchasers. Under *Wolin v. Jaguar Land Rover North America, LLC*, individual causation questions cannot prevent class certification when a product contains an inherent design defect that breaches a uniform warranty. 617 F.3d 1168, 1174 (9th Cir. 2010). By ruling that individual causation issues can prevent certification of Plaintiffs' proposed class, did the district court manifestly err, thus making Rule 23(f) review appropriate?

BACKGROUND

I. Facts

Defendant Microsoft makes the Xbox 360, a video game console. (Dist. Ct. No.[1] 10, ¶ 16.) To play a video game on the Xbox, the user inserts a game disc into the console's optical disc drive. (*Id.* ¶¶ 1, 17.) The Xbox's optical disc drive "reads" the game disc's data and allows the user to play the game stored on the disc.

The six named Plaintiffs each own an Xbox. (*Id.* ¶¶ 3-8.) The Plaintiffs bought game discs to play on their Xboxes, but while they were using their Xboxes in a normal fashion, the Xboxes scratched their discs. (*Id.* ¶¶ 39, 41, 43-44, 46-47, 53, 56-57.) These scratches all had a distinctive circular shape that went all the way around the underside of the game disc. (*See id.* ¶ 23.) These scratches prevented the data on the Plaintiffs' discs from being read by the Xbox's optical

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[1] "Dist. Ct. No." refers to the document entries on the district court's docket.

disc drive—thus rendering these game discs useless. (*Id.* ¶¶ 23, 41, 44, 47, 53, 57.)

These distinctive scratches, the Plaintiffs allege, point to an inherent design defect present in every Xbox. Unlike industry-standard optical disc drives, which are designed to prevent fast-spinning discs from crashing into internal disc drive components, the Xbox's optical disc drive cannot withstand even minute unintentional movements. Thus, when the Xbox console is moved even minutely, the game disc can become uncoupled from the spindle that holds it, crash into internal disc drive components, and become scratched beyond repair. (*Id.* ¶¶ 24-27.)

Plaintiffs also allege that the Xbox was subject to express and implied warranties. The express warranty provided that the Xbox would be free of any defect that caused it not to conform to the written user instructions. (*Id.* ¶¶ 62, 66.) The implied warranty provided that the Xbox would be free of any defect that made it unfit for its ordinary purpose. (*Id.* ¶ 82.) The Xbox's inherent design defect breaches these warranties because it can scratch game discs under normal use. (*Id.* ¶¶ 62, 66, 82.)

To remedy these breaches, Plaintiffs bring claims for breach of the Xbox's express warranty, the Xbox's implied warranty, and violation of the Magnuson-Moss Warranty Act. (*Id.* ¶¶ 66, 74, 92.) And to bring these claims as a class, they seek to certify a "Nationwide Console Class" under Rule 23(b)(3). This

Class consists of all who own an Xbox 360 gaming console.[2] (*Id.* ¶ 12(a).)

II. Procedural Posture

After Plaintiffs filed their amended complaint, Microsoft filed a motion to strike the complaint's class allegations. (Dist. Ct. No. 14.) Microsoft's motion relied on an earlier proposed class action that had been based on the same design defect in the Xbox. In that proposed class action, a district court, back in October 2009, had denied Rule 23(b)(3) certification based largely on an order in *Gable v. Land Rover North America, Inc.*, No. CV07-0376, 2008 WL 4441960 (C.D. Cal. Sept. 29, 2008). In its motion below, Microsoft argued that the district court should, as a matter of comity, defer to the earlier denial of certification and strike the Plaintiffs' class allegations from their complaint. (Dist. Ct. No. 14 at 12-14.)

In their opposition to Microsoft's motion, Plaintiffs noted that the earlier certification order on which Microsoft relied was based on the order in *Gable*. (Dist. Ct. No. 23.) But *Gable* was appealed and reversed in *Wolin v. Jaguar Land Rover North America, LLC*, 617 F.3 d 1168 (9th Cir. 2010). The intervening change in the law worked by *Wolin* made deference to the earlier certification order inappropriate, even under Microsoft's theory of comity.

The district court granted Microsoft's motion. It concluded that deference to the earlier certification order was appropriate because *Wolin* had not undercut the entirety of the earlier order's reasoning. *See*

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[2] Before the district court, Plaintiffs asserted other claims and sought to certify other classes, but they do not seek Rule 23(f) review of those claims and classes.

Order at 10, *Baker v. Microsoft Corp.*, No. 2:11-cv-00722-RSM (W.D. Wash. Mar. 27, 2012) (attached as Appendix A).

ARGUMENT

This case is an ideal candidate for review under Rule 23(f). Plaintiffs present a purely legal question to which the district court provided an answer directly contrary to this Court's decision in *Wolin*.

This Court has listed three situations in which Rule 23(f) review will be "most appropriate." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005). These are when:

> (1) there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable; (2) the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; or (3) the district court's class certification decision is manifestly erroneous.

Id. These are "merely guidelines, not a rigid test." *Id.* at 960. The Court may grant a 23(f) petition when just one of the three factors applies. *See id.* (review will ordinarily require "one or more" of the categories to apply).

This case falls under *Chamberlan*'s first and third categories of cases. For purposes of exposition, Plaintiffs will examine these categories in reverse order. After discussing why the district court's order is

appealable under Rule 23(f), Plaintiffs will show (1) why the district court's decision is manifestly erroneous as a matter of law, and (2) why its decision creates a death-knell situation for Plaintiffs.

I. The District Court's Order Is Appealable Under Rule 23(f) Because It Was Functionally Equivalent to a Decision on Class Certification.

The district court struck the class allegations from Plaintiffs' complaint. Because that decision foreclosed the possibility of class certification, it is functionally equivalent to a decision on class certification and is appealable under Rule 23(f).

The Seventh Circuit has already ruled that a motion to strike is appealable under Rule 23(f). *In re Bemis Co.*, 279 F.3d 419 (7th Cir. 2002). In *Bemis*, a defendant employer filed an answer contending that the EEOC, which was suing on behalf of a class of black employees, could not comply with requirements of Rule 23. *Id.* at 420-21. The EEOC moved to strike this part of the answer on the ground that its suit was exempt from Rule 23, and the district court granted the motion. *Id.* at 421. The employer petitioned from that decision under Rule 23(f), and the EEOC argued that the Seventh Circuit lacked jurisdiction because the district court's decision was not formally a decision on class certification. The Seventh Circuit, speaking through Judge Posner, disagreed. The employer's answer had asserted that the suit could not proceed as a class action without complying with Rule 23, and the district court's "rejection of that position was the functional equivalent of denying a motion to certify a case as a class action." *Id.* The decision was thus appealable under Rule 23(f). *Id.*

Like the employer's motion in *Bemis*, Microsoft's motion to strike Plaintiffs' class allegations asserted that this case was not appropriate for "aggregate treatment" under Rule 23. (Dist. Ct. No. 14 at 12-19.) Like the district court's order in *Bemis*, the order granting Microsoft's motion ruled that Plaintiffs could not proceed under Rule 23. This is the "functional equivalent of denying a motion to certify a case as a class action," *Bemis*, 279 F.3d at 421, because it means that Plaintiffs cannot invoke Rule 23 and seek class treatment. The district court's decision is therefore appealable under Rule 23(f).

There is good reason to follow the Seventh Circuit's holding: doing otherwise—and creating a circuit split—would insulate motions to strike in this circuit from Rule 23(f) review. The "kind of error most likely to warrant [Rule 23(f)] review will be one of law, as opposed to an incorrect application of law to facts." *Chamberlan*, 402 F.3d at 959. And because motions to strike are decided on the pleadings and present purely legal issues, *Lyons v. Coxcom, Inc.*, 718 F. Supp. 2d 1232, 1236 (S.D. Cal. 2009), they are particularly well suited to Rule 23(f) review. Insulating motions to strike from Rule 23(f) review would undercut the Rule's purpose.

This Court should follow the Seventh Circuit and hold that the district court's order is appealable, in this Court's discretion, under Rule 23(f).

II. The District Court's Order Is Manifestly Erroneous Because It Conflicts with This Court's Directly Controlling Decision in *Wolin*.

The district court's order was manifestly erroneous. It cannot be squared with this Court's "directly controlling" decision in *Wolin*. *Chamberlan*, 402 F.3d

at 962 (a decision that goes against directly controlling precedent is manifestly erroneous). The district court's error, moreover, is an error of law that appears on the face of its decision. *See id.* (manifest error must be easily ascertainable on the face of the petition). An appeal under Rule 23(f) is appropriate.

Plaintiffs seek certification under Rule 23(b)(3), which provides that certification is appropriate when two requirements are met.[3] First, there is the *predominance* requirement: "questions of law or fact common to class members" must "predominate" over individual questions. FED. R. CIV. P. 23(b)(3). Second, there is the *superiority* requirement: a class action must be "superior to other available methods for fairly and efficiently adjudicating the controversy." *Id.* Microsoft's motion to strike was based solely on the predominance requirement of Rule 23(b)(3). (*See* Dist. Ct. No. 23 at 16 n.7.) Microsoft argued, in reliance on an earlier district court order, that individual questions of damages and causation predominate. (Dist. Ct. No. 14 at 16.)

A. *Wolin* Is on All Fours with This Case.

Plaintiffs allege that their Xboxes are covered by the same express and implied warranties. (Dist. Ct. No. 10, ¶¶ 62, 73-75, 92.) Plaintiffs allege that their Xboxes all had the same inherent design defect that breached these warranties. (*E.g.*, *id.* ¶¶ 17, 27.) Their warranty claims are not predicated on whether this inherent design defect has yet manifested itself in a scratched game disc. They are predicated on whether

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[3] Certification also requires that the prerequisites of Rule 23(a) be satisfied, but Microsoft has not argued that Plaintiffs fail to satisfy the Rule 23(a) prerequisites.

the inherent design defect exists and whether it breaches the Plaintiffs' uniform warranties.

These facts put this case "on all fours" with *Wolin*. *Chamberlan*, 402 F.3d at 962. There, automobile owners alleged that they all had the same limited warranty, and that their automobiles all had the same inherent defect that breached the limited warranty. *Wolin*, 617 F.3d at 1174. This Court held that this inherent-defect warranty claim "require[d] common proof of the existence of the defect and a determination whether Land Rover violated the terms of its Limited Warranty." *Id.* Accordingly, "common issues predominate[d]," Rule 23(b)(3)'s predominance requirement was met, and certification should have been granted. *Id.*

Thus, *Wolin* holds that in these particular circumstances—where plaintiffs enjoy a uniform warranty and allege an inherent design defect that occurs in every product—common issues of damages and causation predominate *as a matter of law*. In these circumstances, a court may certainly deny certification on other grounds—inadequacy of representation under Rule 23(a)(4), as just one example—but it cannot deny certification on the ground that individual issues of damages and causation predominate.

Wolin is not just binding law its holding is well reasoned, as its application here shows. When *Wolin*'s holding is applied to Plaintiffs' warranty claims, it becomes apparent that common questions of causation and damages predominate.

Wolin held that if a class's warranty claims are based on the mere existence of a uniform design defect, the only question of "causation" will be whether the uniform design defect exists at all—something that

can be proven on a class-wide basis. Here, the limits of normal Xbox use—the maximum amount of force an Xbox should be able to withstand without scratching a disc, for example—may be proven on a common basis by reference to reasonable consumer expectations or the Xbox's own engineering specifications. More common proof, such as the results of laboratory performance testing, can then be adduced to show whether, under the predefined limits of normal use, a game disc is likely to be scratched—and thus whether the design defect really breaches the warranties. Under this method of proof, it becomes irrelevant whether any *individual* plaintiff's game disc was scratched under normal conditions.

Wolin likewise held that individual questions of damages do not arise. Here, because all class members suffered the precisely the same breach of warranty from precisely the same inherent design defect in the Xbox, they all suffered the same injury.

Finally, *Wolin* distinguishes between two different types of warranty claims: (1) those based on the existence of a uniform design defect, and (2) those based on damage *caused* by a uniform design defect. *Wolin* held that under the first type of claim, individual questions of causation and damages will not predominate. Thus, *Wolin* held that for a warranty claim based on an automobile's defectively designed alignment system, individual questions did not predominate. *Wolin*, 617 F.3d at 1173-74. But *Wolin* also dealt with a separate claim asserted under an entirely different warranty—a warranty against tire damage caused by the defectively designed alignment system. *Id.* at 1174. For this claim, said the *Wolin* court, individual questions of causation might predominate. *See id.* Here, Plaintiffs do not base their

claim on the scratched discs that the Xbox's flawed design may have caused. Rather, Plaintiffs claim that their warranties were breached simply by the flawed design of the Xbox's optical disc drive.[4] *See supra* pp. 2-3, 8-9. For *this* sort of warranty claim, *Wolin* is clear that common questions of causation and damages predominate as a matter of law. *Wolin*, 617 F.3d at 1173-74.

B. The District Court's Decision Cannot Be Squared with *Wolin*.

In deciding Microsoft's motion to strike, the district court looked at an earlier proposed class action against Microsoft that had been based on the same Xbox design defect. There, another district court had denied certification on the ground that individual questions of causation and damages predominated. *See* Order, *In re Microsoft Xbox 360 Scratched Disc Litig.*, No. 2:07-cv-01121-JCC (W.D. Wash. Oct. 5, 2009) (attached as Appendix B). The district court in this case, applying principles of comity set out in the American Law Institute's *Principles of the Law of Aggregate Litigation*, deferred to that earlier decision. (Appendix A at 7 (citing Am. Law. Inst., *Principles of the Law of Aggregate Litigation* § 2.11 (2010)).) Crucially, the district court below recognized that, under the *Principles of the Law*, deference to an earlier decision does not apply when there has been an intervening change in the law (*id.*)—but the court ruled that *Wolin*

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[4] In the district court, Plaintiffs asserted non-warranty claims based on damage caused by the Xbox's design defect. Plaintiffs do not seek review of these non-warranty claims, and they have never alleged that their warranties were breached by the scratches the Xbox's design defect caused. Thus, the only claims before this Court are warranty claims based on the existence of the design defect itself.

did not call the earlier decision into question (*id.* at 9-10).

Thus, the dispositive question is whether the earlier district court decision can be squared with *Wolin*. If *Wolin* and the earlier decision are in direct and irreconcilable legal conflict, as they are, then it was manifestly erroneous to defer to the earlier certification decision and grant Microsoft's motion to strike. Thus, Microsoft's argument for deference to an earlier certification decision does not make Rule 23(f) review inappropriate—indeed, it only makes it *more* appropriate. For even under Microsoft's argument, there can be no deference to an earlier certification decision if that decision has since become obsolete as a matter of law. The district court's ruling that the earlier certification decision is *not* obsolete is a pure and manifest error of law that makes Rule 23(f) review appropriate.

Here, the district court, rather than focusing on this Court's analysis of the inherent-design-defect warranty claim, simply quoted this Court's statement that "manifestation of a defect is not a prerequisite to class certification." *Wolin*, 617 F.3d at 1173. The district court stated that the earlier certification decision was consistent with *Wolin* because it had not made manifestation of a defect a "prerequisite" to class certification. (Appendix A at 10.) Rather, the earlier decision had simply relied on individual questions of causation to deny certification (*id.*), and it was these same questions that continued to make certification inappropriate. The district court in this case did not specify what these individual questions of causation could be. (*Id.*)

The district court in this case did not examine *Wolin*'s discussion of warranty claims. It did not

acknow-ledge that, both here and in *Wolin*, the proposed classes alleged that an inherent design defect appeared in every product sold, and that this design defect breached uniform warranties. Instead, the district court simply ruled that under *Wolin* there may be unspecified individual questions of causation that predominate over common questions and thereby preclude class certification under Rule 23(b)(3).

That ruling was manifestly erroneous because it cannot be squared with *Wolin*. For *Wolin* held, *as a matter of law*, that certification could not be denied on the ground that individual questions of causation predominate. That is certainly how the district court, on remand from *Wolin*, interpreted the *Wolin* decision. *See Gable v. Land Rover N. Am., Inc.*, No. SACV 07-0376, 2011 WL 3563097, at *5 (C.D. Cal. July 25, 2011) ("The Ninth Circuit's holding is clear that the necessary elements of Rule 23 have been met . . . ."). That interpretation conflicts with the district court's decision here. This conflict within the Ninth Circuit makes this Rule 23(f) petition all the more urgent.

The district court manifestly erred by holding that, even after *Wolin*, individual causation issues could preclude certification of Plaintiffs' proposed class under Rule 23(b)(3). After *Wolin*, that cannot be true.

C. Plaintiffs Have Standing to Assert Their Warranty Claims, and Microsoft's Arguments to the Contrary Are Meritless.

Before the district court, Microsoft argued that Plaintiffs lacked standing because an inherent design defect that does not manifest itself in a scratched disc cannot confer Article III standing. The district court did not base its ruling on this argument, but Plaintiffs will briefly discuss two reasons that Microsoft's

argument does not counsel against Rule 23(f) review and is meritless.

First, this is not a question that this Court needs to reach. In *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013 (9th Cir. 2011), this Court said that to satisfy Article III requirements, a class need show only that the representative parties have standing—indeed, that only one representative party has standing. *See id.* at 1021 (on standing, "our law keys on the representative party, not all of the class members, and has done so for many years"); *see also Bruno v. Quten Research Inst., LLC*, — F.R.D. —, 2011 WL 5592880, at *5 (C.D. Cal. Nov. 14, 2011) (following *Stearns* on this point). Since the named Plaintiffs here suffered scratched game discs and not merely the Xbox's inherent design defect, they have standing even under Microsoft's theories.

Second, many cases hold that the existence of a design defect itself is enough to create standing, even if it has not yet manifested itself. *See, e.g., In re Zurn Plex Plumbing Prods. Dab. Litig.*, 644 F.3d 604, 616-17 (8th Cir. 2011). These holdings are based on the uncontroversial principle that the economic harm of buying a product with an inherent design defect—i.e., the defect's diminution of that product's value—creates Article III standing. *See San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1130 (9th Cir. 1996) ("Economic injury is clearly a sufficient basis for standing."). Microsoft may argue that an inherent design defect will create standing only if it is "substantially certain" to manifest itself in other damage. (Dist. Ct. No. 26 at 8-9.) Even if that standard were correct, it is a factual, not a legal, question whether the Xbox's design defect is substantially certain to result in other damage when the console is used normally. It was Microsoft that chose to bring a

motion to strike, and it cannot now raise factual questions in support of a motion that must be decided on the pleadings.

D. The Denial of a pre-*Wolin* Petition in Another Litigation Is Irrelevant.

In the earlier proposed class action alleging the same design defect in the Xbox, the plaintiffs petitioned this Court under Rule 23(f) after the district court had denied certification. That petition was denied on January 21, 2010. Order, No. 09-80160 (9th Cir. Jan. 21, 2010).

Throughout this litigation, Microsoft has emphasized this Court's earlier denial of Rule 23(f) review, but it ignores that that denial came some eight months before *Wolin* came down. Now, however, *Wolin* is on the books. This Court now confronts a district court decision that conflicts with the directly controlling decision in *Wolin*. In these changed circumstances, this petition should be granted.

Microsoft's stress on the earlier petition also presumes it can read this Court's mind. The denial of a Rule 23(f) petition rests in this Court's "unfettered discretion." FED. R. CIV. P. 23 advisory committee notes, 1998 amend. Plaintiffs do not presume to know why this Court denied the earlier petition. Just like the denial of certiorari by the Supreme Court, the denial of a Rule 23(f) petition says nothing about the merits of a district court's decision. *Teague v. Lane*, 489 U.S. 288, 296 (1989); *see also* FED. R. CIV. P. 23 advisory committee notes, 1998 amend. (likening Rule 23(f) to Supreme Court's certiorari power).

III. The District Court's Order Creates a Death-Knell Situation for Plaintiffs.

Rule 23(f) review is also appropriate when "there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable." *Chamberlan*, 402 F.3d at 959. That is true here: Plaintiffs face a death-knell situation, and the district court's order is questionable—indeed, more than questionable.

A "death-knell" situation occurs for plaintiffs when there is "only one path to appellate review: proceeding to a final judgment on the merits of an individual claim that, without the class, is worth far less than the cost of litigation." *Chamberlan*, 402 F.3d at 957 (relying on the advisory committee notes to Rule 23(f)). That description fits this case. The small size of Plaintiffs' claims makes it economically irrational to bear the cost of litigating this case to final judgment. In other words, the district court's order effectively kills the case, since "only a lunatic or fanatic" would incur the costs of litigation to recover the individual amounts of money involved here. *Carnegie v. Household Intl, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

That the district court's order will indeed kill this case is shown by the earlier proposed class action, involving the same Xbox design defect. There, after the district court had denied certification, the parties filed a stipulated motion for dismissal, which the district court then granted. *See* Order, *In Re Microsoft Xbox 360 Scratched Disc Litig.*, No. 2:07-cv-01121-JCC (W.D. Wash. Mar. 30, 2010).

The district court's decision, moreover, is "questionable." *Chamberlan*, 402 F.3d at 959. In fact, it is more than questionable—it is manifestly erroneous under *Wolin*, as Plaintiffs have explained above. 23(f) review should therefore be granted under *Chamberlan*'s "death-knell" criterion.

CONCLUSION

The district court decision is manifestly erroneous because, as a matter of law, it is directly contrary to this Court's decision in *Wolin*. Without immediate appellate review, Plaintiffs face a death-knell situation. For these reasons, Plaintiffs should be granted permission to appeal under Rule 23(f).

DATED this April 9, 2012.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed June 12, 2012]

No. 12-80085
D.C. No. 2:11-cv-00722-RSM
Western District of Washington, Seattle

SETH BAKER; et al.,

Plaintiffs-Petitioners,

v.

MICROSOFT CORPORATION,
a Washington Corporation,

Defendant-Respondent.

ORDER

Before: LEAVY and HAWKINS, Circuit Judges.

The court, in its discretion, denies the petition for permission to appeal the district court's March 27, 2012 order. *See* Fed. R. Civ. P. 23(f); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005) (per curiam).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[Filed 09/25/12]

Case No. 2:11-cv-00722-RSM

SETH BAKER, JESSE BERNSTEIN, MATTHEW DANZIG, JAMES JARRETT, NATHAN MARLOW, and MARK RISK, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MICROSOFT CORPORATION, a Washington Corporation,

Defendant.

Note on Motion Calendar: October 19, 2012

PLAINTIFFS' MOTION TO DISMISS CASE WITH PREJUDICE

Plaintiffs move that this action be dismissed with prejudice, with all parties to bear their own costs and fees. This motion is not made pursuant to a settlement agreement.

After the Court has entered a final order and judgment, Plaintiffs intend to appeal the Court's

March 27, 2012 order (Dkt. 32) striking Plaintiffs' class allegations.

DATED this 25th day of September, 2012.

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